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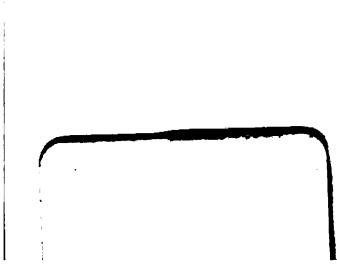
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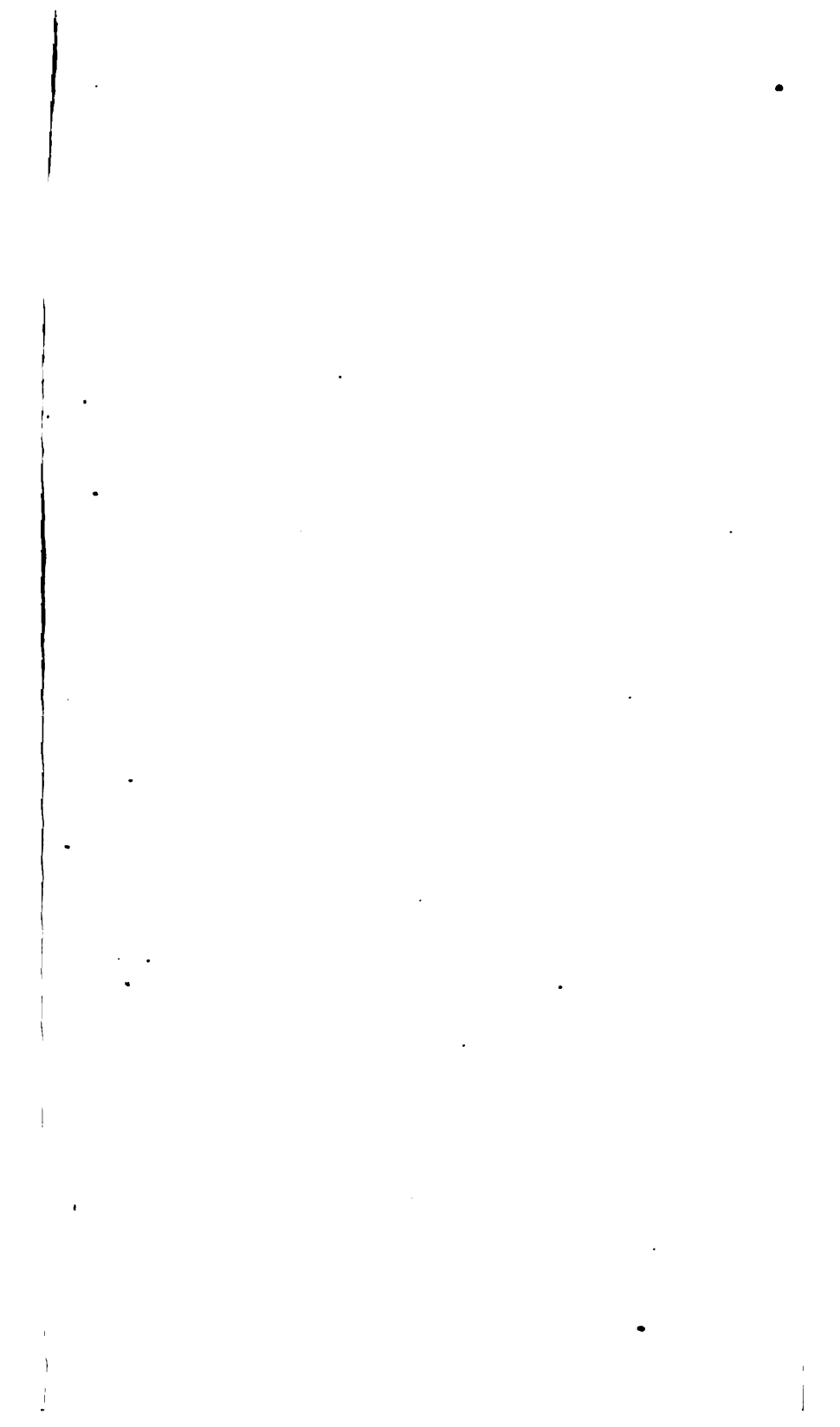
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THE
AMERICAN DECISIONS

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

**FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1880.**

COMPILED AND ANNOTATED

By A. C. FREEMAN,

**COUNSELLOR AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGMENTS,"
"CO-TESTAMENT AND PARTITION," "EXERCUTIONS IN CIVIL CASES," ETC.**

Vol. LXVI.

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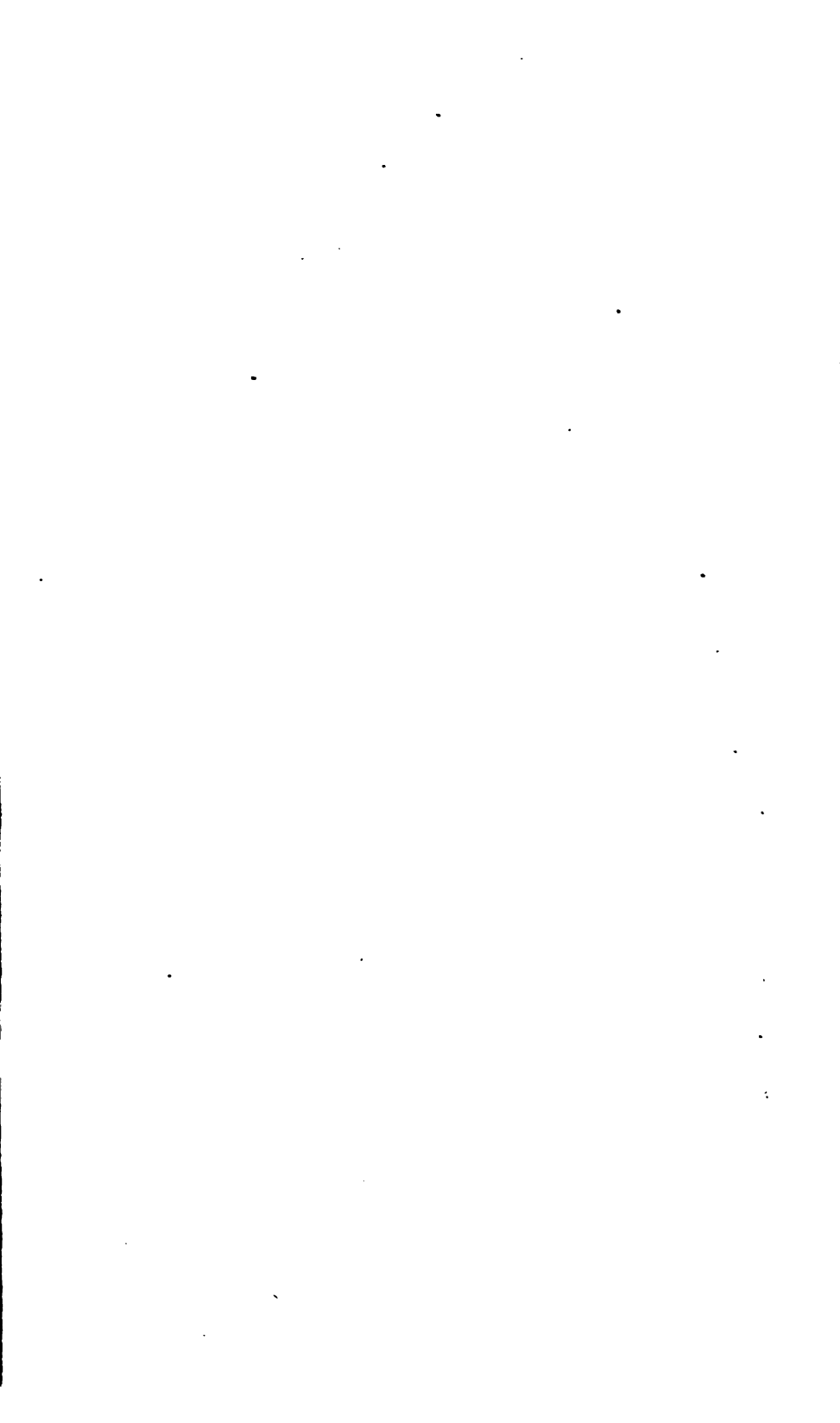
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AMERICAN DECISIONS.

VOL. LXVI.

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MERCHANTS' AND MECHANICS' BANK v. HEWITT.

[3 IOWA, 93.]

WAREHOUSE RECEIPT FOR CERTAIN NUMBER OF BUSHELS OF CORN, to be delivered to the order of the person to whom the receipt is given, at a certain place, in sacks, in good order, free of charges, risk of fire excepted, is not a negotiable instrument under the laws of Iowa.

IOWA CODE, SECTION 949, AUTHORIZES ASSIGNEE OF WAREHOUSE RECEIPT, by which the maker promises to deliver a certain quantity of corn, to sue in his own name, subject, however, to any defense or set-off, legal or equitable, which the maker had against the assignor, before notice of the assignment.

USE OF WORDS "TO BE DELIVERED TO HIS ORDER," in a warehouse receipt for a quantity of corn, do not of themselves manifest an intention on the part of the maker to render it negotiable.

NOTICE OF ASSIGNMENT OF NON-NEGOTIABLE INSTRUMENT MUST BE GIVEN, in order to render the assignment valid.

VENDOR OF PROPERTY HAS LIEN ON IT FOR PRICE, where it is sold on a credit, and remains in his hands, and the vendee is only entitled to the possession upon payment or tender of the price.

ACTION by the assignee of the following receipt, to recover the value of the corn mentioned therein: "1,000 bushels corn. Leclaire, Iowa, June 30, 1854. Received in store, on account of S. F. Atwood of Chicago, Illinois, one thousand bushels of good, sound, merchantable shelled corn, to be delivered to his order, to the steamboat landing at Leclaire, in gunny sacks, in good order, free of charges. Risk of fire excepted. W. H. Hewitt." The defendant offered to prove that his defense, as set up in his answer, existed before he had notice of the indorsement of the receipt to the plaintiff, and before it was in fact in-

dorsed. Plaintiff's objection to this evidence was sustained. There was judgment for the plaintiff, and the defendant appealed. The other facts appear from the opinion.

Whitaker and Grant, for the appellant.

Cook and Dillon, for the appellee.

By Court, STROCKTON, J. The important and material question involved in this cause is, whether the receipt sued on is a negotiable instrument, under the laws of this state, and whether the defendant should have been permitted by the court to make the same defense to it, in the hands of the assignee, that he might have made to a suit brought upon it by the original obligee. Such a receipt was not assignable at common law, so as to authorize suit upon it in the name of the assignee. Our statute (Code, sec. 949) has altered the common-law rule, so far as to allow such a suit. Independent of this provision of the statute, unless Hewitt had assented to the assignment, suit must have been brought in the name of Atwood, for the use of the assignee. Such an action would have been open to all the equitable defenses which Hewitt might have made had the suit been for the benefit of Atwood, as well as in his name, provided those defenses rest in honest transactions, which took place between Hewitt and Atwood before the assignment, or after the assignment and before Hewitt had notice or knowledge of it: *Parsons on Contracts*, 196.

It is claimed by plaintiff that the receipt is negotiable under section 950 of the code; that the corn being deliverable to the "order" of Atwood, the receipt has all the incidents of negotiability. We cannot coincide in this opinion. Such instruments may undoubtedly be made negotiable by agreement of parties, but they are only so under the statute "whenever it is manifest from their terms that such was the intent of the maker; but the use of the technical terms 'or order,' or 'bearer,' will not manifest such intent." The corn in this case was to be delivered to the "order" of Atwood. These words, however, unaccompanied with any other evidence of an intent to make the receipt negotiable, are not sufficient to give it the character and incidents of negotiability. Our conclusion is, that as it is not manifest from the terms of the receipt that it was the intention of Hewitt to make it negotiable, although under section 949 of the code it is assignable by indorsement, and the assignee may sue on it in his own name, yet it is subject to any defense or set-off, legal or equitable,

which Hewitt had against Atwood before notice of the assignment. In order to constitute a valid assignment of an instrument of writing like the present, notice must be given to the maker. If without such notice the maker delivered the property to the assignor, he will be discharged. And if after assignment another person obtain a second assignment and first give notice of his equity, he will be preferred to the first assignee: *Parsons on Contracts*, 196; *Richards v. Griggs*, 16 Mo. 418 [51 Am. Dec. 204]; *Dearle v. Hall*, 3 Russ. Ch. 1; 2 Story's Eq. Jur., secs. 1047, 1057.

The defendant avers in his answer that until the commencement of the suit he had no notice of the assignment of the receipt to plaintiff; and before he received such notice, Atwood was, and still is, indebted to defendant in the sum of four hundred and fifty dollars for the price of the corn; that he has never received payment from said Atwood, nor any other person; and that the corn is still in his possession, where it had been since the execution of the receipt, and he claims the right to retain it until he is paid the price of the same. To this answer a demurrer was sustained. If it is permitted to Hewitt to make the same defense to the action by the assignee to recover the value of the corn that he might have made to a suit on the receipt by Atwood, we cannot resist the conclusion that the demurrer was improperly sustained. The receipt not being negotiable, the plaintiff stands in no better position than Atwood would have stood in if he had sued Hewitt on the receipt. In such an action, then, would Hewitt's answer been a good defense? It will be remembered that there had been no delivery of the corn. It still remains in the warehouse of Hewitt. Atwood had accepted a draft for the price of the corn, which was protested, and never paid. If property is sold for cash and the price be not paid, or if it be sold on a credit and remain in the hands of the vendor, the vendor has a lien on it for the price; and only payment or tender gives the vendee a right to possession: 1 *Parsons on Contracts*, 440. Demand on Hewitt for the corn was not made until October; and as Atwood had not in the mean time paid the price of it to Hewitt, and the corn had all the time remained in his possession, Hewitt was entitled to retain the corn until he was paid for it according to agreement. This answer, then, would have been good in a suit by Atwood against Hewitt, and is equally good in any suit by Atwood's assignee. We conclude, therefore, that the demurrer to the answer was improperly sustained, and the evidence offered by defendant should have been received.

We have carefully considered the arguments of plaintiffs' counsel, based upon analogy between this receipt and an ordinary bill of lading. We see no good reason to change our views of the subject presented above. A bill of lading is the contract of the master of a vessel to deliver the property to the person to whom the consignor or shipper shall order the delivery. It is transferable by indorsement, and the property passes to the assignee. This is the result of well-settled principles of the commercial law. The doctrine predicated of bills of lading by the defendant's counsel is undoubtedly correct in all questions arising between the consignor or shipper and the consignee or his assignees. But in an action against the master of a vessel, or obligor in the bill of lading, for the non-delivery of the goods, other principles must govern, and the right of the parties must be regulated by the code; and we are unable to give its provisions any other interpretation than such as will allow to the maker of the corn receipt every legal and equitable defense in a suit by the assignee which he might make in a suit in the name of the original payee.

Judgment reversed.

REQUISITES OF PROMISSORY NOTE: See *Fralick v. Norton*, 55 Am. Dec. 56, note 59, where other cases are collected; note to *New Hope D. B. Co. v. Perry*, 52 Id. 454.

WAREHOUSEMAN'S RECEIPT, EFFECT OF: See *Smith v. Pickett*, 50 Am. Dec. 385.

DEBTOR IS NOT AFFECTED BY ASSIGNMENT OF HIS CREDITOR'S CLAIM UNTIL HE HAS NOTICE OF IT: See *Walters v. Washington Ins. Co.*, 63 Am. Dec. 451, note 456, where other cases are collected.

VENDOR'S LIEN ON GOODS: See *Arnold v. Delano*, 50 Am. Dec. 754, note 760, where other cases are collected.

COOPER v. SUNDERLAND.

[3 IOWA, 114.]

SECTION 1508 OF IOWA CODE IS NOT GENERAL STATUTE OF LIMITATIONS, and does not apply to sales made prior to its enactment; its application is limited to causes arising under chapter 88 of the code.

EVERY PRESUMPTION IS MADE IN FAVOR OF JURISDICTION of courts superior and of general jurisdiction, while this presumption is not exercised in relation to the jurisdiction of a court inferior and limited, which must be shown. But where the jurisdiction of an inferior and limited court is shown, there the same presumption prevails in favor of its proceedings that does in favor of those of a superior court.

WHEN POWER IS GIVEN TO COURT OVER SPECIAL MATTER which is not in the usual course of the common law, and a mode for the exercise of such power is prescribed, such mode must be pursued, whether the tribunal be superior or inferior, and sufficient must appear on the face of the record to show the case to be within the reach or jurisdiction of the tribunal. If sufficient appears on the face of the record to give the court jurisdiction under the law conferring the power, then the presumption attaches in favor of the remainder of the proceedings of the court, whatever that court may be.

SUFFICIENCY OF PETITION CALLING INTO ACTION POWER OR JURISDICTION of the court, if there be such petition, cannot be called in question collaterally. And if there be a notice or publication, or whatever of this nature the law requires in reference to persons, its sufficiency cannot be questioned collaterally.

PROVISIONS OF IOWA ACT OF 1843, SECTION 20, CHAPTER 11, ARE PER-EMPTORY, and not directory only, and to render valid a guardian's sale of real estate made thereunder it must appear, either from the record or by evidence *aliunde*, that the guardian took the oath required by the statute before fixing on the time and place of the sale.

ACTION of right to recover the possession of a lot of land in the city of Burlington. The plaintiff claimed title as heir at law of Thomas Cooper, who was seised of the premises at the time of his death. The title relied on by the defendants was based on a deed from Ann Wigington, formerly Ann Cooper, as guardian of the heirs of Thomas Cooper, deceased, to David Wigington, executed under and by virtue of an order and decree of the district court of Des Moines county. The defendants pleaded that the plaintiff ought not to maintain his action, because more than five years had elapsed since the execution of the deed from Ann to David Wigington. They denied the plaintiff's claim, and alleged title in themselves by virtue of certain conveyances, including the one above mentioned. The plaintiff offered evidence tending to show title in himself. The defendants offered in evidence the deeds mentioned in their answer, and the records of the proceedings in the district court under which the land was sold by Ann Wigington. The court gave judgment for the plaintiff. The other necessary facts are stated in the opinion.

David Rorer, and Browning and Tracey, for the appellants.

J. C. Hall, for the appellee.

By Court, WOODWARD, J. There are two acts of the legislature which have relation to the case. The first is that of January 25, 1839, R. S. 1842-3, c. 99, sec. 430, entitled an act concerning minors, orphans, and guardians; the second is that

of February 13, 1843, R. S. 1843, c. 162, sec. 666, entitled an act relative to the probate of wills, executors, administrators, guardians, trustees of minors, and probate courts, and for defining their duties. For the sake of brevity, we will refer to these as the first and the second act.

There is a difficulty presented in the second of the above acts, which calls for some preliminary attention. Chapter 10 of this act is entitled: "Of the sale of lands for the payment of debts by executors, administrators, and guardians;" whilst chapter 11 relates entirely to sales by guardians. The provisions of the two relative to guardians' sales are in some respects dissimilar. The question is, which chapter is to govern in this cause. As the act has been repealed, we need not enter into a discussion of the matter, but will only remark that there is much which would lead to the idea that the provisions of chapter 11 relate principally to guardians of insane persons, spendthrifts, etc. This view would be countenanced by the fact that the title of chapter 10 refers to sales to pay debts, and a minor can have no debts but for maintenance, and that for this chapter 11 expressly provides; besides, chapter 11 and the first act above referred to cover the whole subject of minors and their guardians; and if chapter 10 be considered as relating to minors' debts, and the charges in the case at bar be regarded as debts, in distinction from maintenance, still section 24 of chapter 10 perhaps removes the difficulty, by providing that in such cases sales may be made as directed in this (10th) chapter, "excepting in the particulars in which a different provision is hereinafter made," which refers to the next chapter, undoubtedly. We shall therefore make chapter 11 our guide, and its provisions are in general like those of the preceding chapter.

The first question which arises is upon the limitation of such actions. The second act, chapter 11, section 19, provides that no action for the recovery of any estate sold by a guardian, under the provisions of this chapter, shall be maintained by the ward, or by any person claiming under him, unless it be commenced within five years next after the termination of the guardianship." Then follows an exception in favor of minors and others under legal disability, to whom five years are allowed after the removal of the disability. There is nothing in the case showing that the action was not brought within five years next after the termination of the guardianship; and still more, it does not appear but that it was brought in due time after the removal of the disability of minority. On the contrary, the

presumption from the facts shown is that the action is free from the objection that it was not brought in due time. That it was not commenced within five years after the sale is not a valid objection under the former acts, without adverting to the fact of their repeal. But it is said that the plaintiff's right of action is barred by the code, sec. 1508, which is that "no person can question the validity of such sale after the lapse of five years from the time it was made." The sale was made on the first of May, 1848, and the action was commenced the thirteenth of October, 1853, more than five years after the sale. The repeal of the act of February, 1843, by the code, took effect on July 1, 1851. The question then is, whether section 1508 of the code bars the plaintiff's right to bring this action to question the validity of the sale. The point is presented, but not argued. We are not disposed to regard this section of the code as in the nature of a general statute of limitation, so as to apply it to sales which had taken place prior to the passage of that statute, but should limit its application to causes arising under chapter 88 of the code alone. But if it were to be regarded as an ordinary statute of limitation, then those principles would apply which are settled in the cases of *Norris v. Slaughter*, 1 G. Greene, 338; *Forsyth v. Ripley*, 2 Id. 181; *Hinch v. Weatherford*, Id. 244; *Gordon v. Mounts*, Id. 243.

Objection is made to the sale of the lot in this case, upon three grounds: 1. Because the court decreeing the sale had jurisdiction of neither the subject-matter nor the person; 2. Because the minor was over fourteen years age when the petition for leave to sell was filed; 3. Because the sale was made to the husband of the guardian. The want of jurisdiction of the person arises, if at all, from a want of notice to the minors, and the questions involved in this objection are difficult of solution. The American editors of 1 Smith's Lead. Cas., 5th ed., 844, very truly remark that the inquiry when and under what circumstances the proceedings of inferior courts are to be regarded as void for want of notice is unquestionably involved in much obscurity and confusion. But they add that this difficulty may in some degree be obviated or remedied by remembering that the question when notice shall be presumed is a very different one from that of the effect of a want of notice, when proved or conceded. We have strongly experienced this obscurity and confusion in examining a mass of cases to ascertain an intelligible rule by which to determine this cause. They seem generally to be decided, each upon its own facts, without much

reference to rules; or when such are sometimes given, the mind feels its darkness nearly as much in understanding and applying them as in groping its way without them: See *Voorhees v. Bank of United States*, 10 Pet. 474. In this and in similar cases the questions arise, what is a superior and what an inferior court; when presumptions attach in its favor; what is jurisdiction, and when does it attach; whether notice or other matter which must appear may appear by the record of the judgment, or must be shown otherwise; whether a superior court, acting in a matter not of common-law jurisdiction, but committed to it by statute, is to be regarded as a court of inferior and limited jurisdiction, or whether those presumptions attach to it which pertain to a superior court; and when a court may decide on its own jurisdiction, or how far the decision is conclusive.

On these questions, it requires a treatise rather than an opinion in a cause to reduce the cases to consistency and a system; and an illustration of what even a laborious treatise can do with the subject is to be found by comparing the first and last sentences of a paragraph in 1 Smith's Lead. Cas., 832, 833. The first is, that "whatever may be the rule with regard to courts of general powers, when acting within the scope of those powers, it is well settled that when they do not, and exercise a special and statutory authority, their proceedings stand on the same footing with those of courts of limited and inferior jurisdiction, and will be invalid unless the authority on which they are founded has been strictly pursued;" citing *Denning v. Corwin*, 11 Wend. 647; *Jackson v. Esty*, 7 Id. 148; *Sharp v. Speir*; 4 Hill, 27; *Striker v. Kelly*, 7 Id. 11; *Matter of Mount Morris Square*, 2 Id. 14; *Williamson v. Berry*, 8 How. 495; *Williamson v. Ball*, Id. 566; *Matter of Flaubush Avenue*, 1 Barb. 289; *Muskett v. Drummond*, 10 Barn. & Cress. 153; *Christie v. Unwin*, 11 Ad. & El. 373; *Brancker v. Molyneux*, 4 Man. & G. 226; *Boswell v. Otis*, 9 How. 336; *Thacher v. Powell*, 6 Wheat. 119; *Mayhew v. Davis*, 4 McLean, 213; *Embury v. Connor*, 3 N. Y. 511 [53 Am. Dec. 525]. The last two sentences of this paragraph are as follows: "The inconveniences which may occasionally result from this course of decision are more than compensated by the lesson which it teaches, that from whatever source power may come it will fail of effect when unaccompanied by right. It should, notwithstanding, be remembered that the severity of this doctrine is tempered in practice by the maxim, *Omnia rite acta*, which is emphatically applicable to judicial proceedings, and that every intendment will be made in favor of the validity of the acts of a court within the scope of its powers,

whether those powers are limited or general;" citing *Voorhees v. Bank of United States*, 10 Pet. 449; *Dykman v. Mayor etc.*, 5 N. Y. 494.

Now, it seems to the mind of the writer of this opinion that this second proposition overturns the first; for the first proposition is this in effect, that if a court is not acting within the scope of general (that is, common-law) powers, that is, when it is acting under limited or special powers, they are to be strictly pursued (and examined); and the second proposition is, that when acting within the scope of its powers, whether limited (that is, special) or general, every intendment shall be made. But it is doubted whether the two cases cited support the second proposition. In the second case no "intendment" was made in favor of the court superior and of general jurisdiction upon a matter of attachment, which is not a common-law proceeding; and this case rather suggests a new rule, or a modification of former rules; such as this, that when some process or proceeding not known at common law is added to and incorporated into the proceedings of a court superior and of general jurisdiction and made a part thereof, it is to be adjudicated as one of its ordinary powers, and not as a power or subject conferred upon it, distinct from and independent of its common-law jurisdiction. Thus attachment, which is the subject of *Voorhees v. Bank*, *supra*, is added to or incorporated into the powers of the court, and is to be adjudged upon like its other powers. So the subject of mechanics' lien is new, created by statute, and yet it is apprehended that this, and its process too, is to be adjudicated upon the same rules with the ordinary powers and proceedings of the court. These remarks are made as indicating the obscurity of the subject, and the difficulty of ascertaining the true rules which should guide us. This is seen even in the able and labored note above referred to, which is an attempt to reduce the subject to order. We will, however, endeavor to extract some rules which shall serve as guides in the determination of the cause before us. In regard to courts superior and of general jurisdiction, every presumption is made in favor, not only of their proceedings, but of their jurisdiction. This proposition is familiar, and needs no support. But see 1 Smith's Lead. Cas., 5th ed., notes, 816, 848, where the subject is considered and the cases are cited. This presumption is not exercised, however, in relation to the jurisdiction of a court inferior and limited, but must be shown: Note, *supra*, pp. 816, 818, 822, 848, with authorities. The rule is thus briefly stated in *Peacock v. Bell*, 1 Saund.

74: "The rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a superior court but that which especially appears so; nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged." But where the jurisdiction of an inferior and limited court is shown, there the same presumption prevails in favor of its proceedings that does in favor of those of a superior court: See note, *supra*, pp. 817, 818, 847, 848; *Reeves v. Townsend*, 22 N. J. L. 396; *Wilson v. Wilson*, 18 Ala. 176; *Clark v. Blacker*, 1 Ind. 215; *Paul v. Hussey*, 35 Me. 97; *Wight v. Warner*, 1 Doug. 384; *Fox v. Hoyt*, 12 Conn. 491 [31 Am. Dec. 760]; *Raymond v. Bell*, 18 Id. 81. "Whatever intendment may be made in favor of the decision, there can be none in aid of the right to decide," etc.: *Perrine v. Farr*, 22 N. J. L. 356; *Bridge v. Bracken*, 3 Chand. 75; *Supervisors Crawford Co. v. Leclerc*, 4 Id. 56; *Dempster v. Purcell*, 3 Man. & G. 375; *Rowland v. Veale*, 1 Cowp. 19. When inferior courts have not transcended their powers, "and their jurisdiction has actually attached, it will not be lost by an irregularity in the mode of exercising it; and every intendment will be made in aid of the validity of the proceedings under it, which will be regarded as equally conclusive with those of courts of superior and general jurisdiction:" 1 Smith's Lead. Cas., 5th ed., 847, note, citing *Grignon v. Astor*, 2 How. 319; *Brown v. Wood*, 17 Mass. 68; *McPherson v. Cunliff*, 11 Serg. & R. 422 [14 Am. Dec. 642]; *Reeves v. Townsend*, *supra*; *Van Kleek v. O'Hanlon*, 21 N. J. L. 583; *Pierce v. Irish*, 31 Me. 254; *Wyman v. Campbell*, 6 Port. 219 [31 Am. Dec. 677]; *Samuels v. Findley*, 7 Ala. 635; *Rey v. Vaughn*, 15 Id. 497; *Cox v. Davis*, 17 Id. 714 [52 Am. Dec. 199]; *Savage v. Benham*, Id. 119; *Williams v. Sharp*, 2 Ind. 101; *Small v. Hampstead*, 7 Mo. 373; *Pendleton v. Prestridge*, 12 Smed. & M. 302; *Tryon v. Tryon*, 16 Vt. 313; *McFarland v. Stone*, 17 Id. 165 [44 Am. Dec. 325]; *Clark v. Holmes*, 1 Doug. 390.

"When, however, the existence of jurisdiction is once shown or admitted, the judgments of superior and inferior tribunals stand on the same footing, and are equally and absolutely conclusive;" that is, when not appealed from, or when attacked collaterally: 1 Smith's Lead. Cas., note, 820-848, citing *Hard v. Shipman*, 6 Barb. 621; *Steen v. Bennett*, 24 Vt. 303; *Farrar v. Olmstead*, Id. 123; *Lawrence v. Englesby*, Id. 42; *Wesson v. Chamberlain*, 3 N. Y. 331; *Fort v. Battle*, 13 Smed. & M. 133; *Griar v. McLendon*, 7 Ga. 362; *Williams v. Sharp*, *supra*; *McLean v. Hugarin*, 13 Johns. 184; *Cunningham v. Bucklin*, 8 Cow. 187; *Hard v. Shipman*, *supra*; *Clark v. Holmes*, *supra*; *Reeves v.*

Thomson, *supra*. The next inquiry is, How shall the necessary facts or circumstances conferring jurisdiction "be shown," "or appear" in courts of inferior jurisdiction? A good deal of the ambiguity of cases seems to rest on the answer to this question as applied in practice. A superior court is presumed to act rightly and within its jurisdiction, but an inferior court should set out the requisite facts on the face of its proceedings: Note, *supra*, pp. 816, 818, and many authorities. When the jurisdictional facts are stated on the face of the proceedings of an inferior court, this is taken as *prima facie* proof, or they are presumed to be as stated. But these facts thus shown by the record of inferior courts may perhaps be contradicted, as by the papers in the cause, and in some instances by evidence *aliunde*. And they may also oftentimes (if not generally) be proved by evidence *aliunde*: 1 Smith's Lead. Cas. 816, and authorities, 820, citing *Jenks v. Stebbins*, 11 Johns. 224; *Barber v. Winslow*, 12 Wend. 102; *Clark v. Holmes*, *supra*; *Denning v. Corwin*, *supra*; *Borden v. Fitch*, 15 Johns. 121 [8 Am. Dec. 225]; *Harrington v. People*, 6 Barb. 607; *Noyes v. Buller*, Id. 613; *People v. Cassels*, 5 Hill, 164; *Walker v. Mosely*, 5 Denio, 102; and 1 Smith's Lead. Cas. 843, as to parties, citing *Adams v. Jeffries*, 12 Ohio, 253 [40 Am. Dec. 477]; *Bigelow v. Stearns*, 19 Johns. 39; *Corwin v. Merritt*, 3 Barb. 345; *Fisher v. Lane*, 3 Wils. 297; *Ege v. Sidle*, 3 Pa. St. 124; *Commonwealth v. Green*, 4 Whart. 568; *Smith v. Rice*, 11 Mass. 507; *Chase v. Hathaway*, 14 Id. 222; *Corliss v. Corliss*, 8 Vt. 373; *Enos v. Smith*, 7 Smed. & M. 85; *Gelstrop v. Moore*, 26 Miss. 206 [59 Am. Dec. 254]; *Joslin v. Coughlin*, Id. 134. The case of *Dykman v. Mayor etc.*, 5 N. Y. 434, is a recent case on similar questions, and may possibly throw doubt on the foregoing proposition as to contradicting the record. The proceedings were those of commissioners to appropriate lands to the use of the Croton water-works. If the owner and the commissioners could not agree, it was brought into court. The action was ejectment, brought to recover lands so taken. Gardiner, J., says: "It [the disagreement] was distinctly stated in the petition, and sworn to upon the knowledge of one of the commissioners. This was all that was necessary to give the vice-chancellor jurisdiction *prima facie*. The fact was an issuable one," which, he says, "the party might have controverted, and then it must have been proved, but he was not at liberty to lie by, and in ejectment for the land insist that due proof was not made;" and he adds: "I am inclined to think that if the requisite proof was made to sustain the allegation jurisdiction would

attach although the witness was mistaken or perjured." And Foot, J., says that "when the jurisdiction of a court of limited authority [the vice-chancellor] depends on a fact which must be ascertained by that court, and such fact appears and is stated in the record of its proceedings, a party who had an opportunity to controvert the jurisdictional fact, but did not, and contested upon the merits, cannot afterward, in a collateral action against his adversary in those proceedings, impeach the record and show the jurisdictional fact therein stated to be untrue;" and he cites *Mather v. Hood*, 8 Johns. 50; *Griswold v. Stewart*, 4 Cow. 458; *Van Steenberg v. Bigelow*, 3 Wend. 42; *Brittain v. Kinnaird*, 1 Brod. & B. 432; S. C., 4 Moo. 50; *Smith v. Elder*, 8 Johns. 113.

The license for sale in the present case having been granted by the district court of Iowa, the question what is a superior and what an inferior court does not present itself. But another takes its place; which is, whether this superior court is, in the present instance, to be regarded as one of limited and inferior jurisdiction, and whether its proceedings in this matter are to be viewed as those of an inferior court. Here is a special authority, or power, or jurisdiction, conferred upon the court by statute provision. It is one which it had not by the common law, and which is not connected with, and is not made part of the ordinary proceedings of the court. It is not incorporated into them, but is independent of them. It is probably a question of authority, more than of reason, for it is doubtful if there is any principle of reason or justice which decides either way. But if the artificial rule be assumed, that where a superior common-law court is acting out of the common-law line, by virtue of an authority specially conferred, it is acting as an inferior court, then in granting a license to sell the district court was in effect an inferior court, and its acts are to be viewed in that light. The note in 1 Am. Lead. Cas., 5th ed., 843, states the following rules on this subject: "The rule seems to be the same [as with an inferior court], when a superior court acts without the scope of its general and common-law authority, and by virtue of a special and statutory power, for it then becomes necessary to show that the power has been strictly pursued in all essential particulars, both as it regards the subject-matter of the cause and the parties;" and cites *Williamson v. Berry*, 8 How. 495; *Williamson v. Ball*, Id. 566; *Webster v. Reid*, 11 How. 437; *Denning v. Corwin*, 11 Wend. 647; and the same note, on page 832, has the following: "Whatever may be the rule with regard to courts of general powers, when

acting within the scope of those powers, it is well settled that when they do not, and exercise a special and statutory authority, their proceedings stand on the same footing with those of courts of inferior and limited jurisdiction, and will be invalid, unless the authority on which they are founded has been strictly pursued;" and cites *Denning v. Corwin*, *supra*; *Jackson v. Esty*, 7 Wend. 148; *Striker v. Kelly*, 7 Hill, 11; *Thacher v. Powell*, 6 Wheat. 119; *Boswell v. Otis*, 9 How. 336; *Matter of Mount Morris Square*, 2 Hill (N. Y.), 14; *Sharp v. Speir*, 4 Id. 76; *Williamson v. Berry*, *supra*; *Williamson v. Ball*, *supra*; *Matter of Flatbush Avenue*, 1 Barb. 289; *Mayhew v. Davis*, 4 McLean, 213; *Embury v. Connor*, 3 N. Y. 511.

Of these cases, the first four support the doctrine quoted, but the remaining nine do not support either this or the preceding quotation. But time does not permit an examination of them, to point out the errors in the reference to them. The following cases support the doctrines just quoted: *Ludlow v. Johnson*, 3 Ohio, 579 [17 Am. Dec. 609]; *Adams v. Jeffries*, *supra*, citing *Bend v. Susquehanna Bridge Co.*, 6 Har. & J. 130 [14 Am. Dec. 261]; *Smith v. Fowle*, 12 Wend. 9. On the other hand, there is a class of cases of high authority which do not seem to consider whether a court is a superior or an inferior one, nor whether it is subject to the rules of an inferior court; but give full sway to the doctrine of presumptions. Of this class are *Elliot v. Peirsol*, 1 Pet. 328; *Thompson v. Tolmie*, 2 Id. 157; *Ex parte Tobias Walkins*, 3 Id. 193; *United States v. Arredondo*, 6 Id. 691; *Voorhees v. Bank of United States*, 10 Pet. 450; *Philadelphia & Trenton R. R. Co. v. Stimpson*, 14 Id. 448; *Grignon v. Astor*, 2 How. 319; *Barney v. Saunders*, 16 Id. 535; *Perkins v. Fairfield*, 11 Mass. 227; *McPherson v. Cunliff*, *supra*; *Wright v. Marsh*, 2 G. Greene, 95.

In *Elliot v. Peirsol*, *supra*, the court says: "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court." In *Thompson v. Tolmie*, *supra*, the heirs of Tolmie, deceased, brought a petition for partition in the circuit court for the District of Columbia, and partition was awarded; but the property being reported indivisible, it was sold. Afterwards the heirs brought ejectment, and held the sale void, because none of the heirs had become of age at the time of the sale, and the statute expressly prohibited a sale until the eldest was of age.

Mr. Key, of counsel for the plaintiffs, contended that the proceedings did not derive their authority from the general powers of the court, and that therefore it was necessary that all the facts upon which the powers were exercised should appear. The court say: "These proceedings were brought before the court below collaterally, and are by no means subject to all the exceptions which might be taken on a direct appeal. They may well be considered judicial proceedings; they were commenced in a court of justice, carried on under the supervising power of the court, and did receive its final ratification. The general and well-settled rule of law in such cases is, that when the proceedings are collaterally drawn in question, and it appears upon the face of them that the subject-matter was within the jurisdiction of the court, they are voidable only. The errors and irregularities, if any exist, are to be corrected by some direct proceedings, either before the same or an appellate court. If there is a total want of jurisdiction, the proceedings are void, and a mere nullity, and confer no right, and afford no justification, and may be rejected when collaterally drawn in question." "The only objection," says the court, "that presents any difficulty is that it was proved that none of the heirs of Robert Tolmie had arrived at age when the sale was made, and how far this will affect the sale will depend upon the question whether the proceedings in partition, when brought up in this collateral way, were open to an inquiry into that fact." They suggest the question whether the jurisdiction depended upon that fact, and argue that it may well be inferred that the petition intended to assert that Margaret was of age; and say that at all events the age of the heirs was a matter of fact upon which the court was to judge; that even if the jurisdiction of the court depended on that fact, it is by no means clear that it would be permitted to contradict it, on a direct proceeding to reverse any order or decree of the court. But to permit that fact to be drawn in question in this collateral way is certainly not warranted by any principle of law. "The rules which apply to and govern titles acquired under sales made by order of orphans' courts and courts of probate are applicable to the case now before the court." They refer to the above quotation from *Elliot v. Peirsol*, 1 Pet. 340, and say: "This is the clear and well-settled doctrine of the law, and applies to the case now before the court. The jurisdiction of the court over the subject-matter appears on the face of the proceedings, and its errors and mistakes, if any were committed, cannot be corrected nor examined when brought up collaterally,

as they were in the circuit court." But the case of *Grignon v. Astor*, 2 How. 319, reviews the whole subject, and becomes very important. The administrator of Pierre Grignon sold land belonging to his estate for the payment of debts, and the heirs bring ejectment to recover it, holding the sale void. The law of Michigan, in which state the case arose, made the same requirements of an administrator and of a guardian, in order to obtain authority to sell. The license was granted by the county court (by which is understood a court of common pleas, or of general jurisdiction), which was authorized thereto by law. The law required the administrator to make a representation of the condition and indebtedness of the estate, and that such representation should be accompanied by a certificate from the judge of probate, certifying the value of the real and personal estate, and the amount of debts, and also his opinion whether it is necessary that real estate should be sold. The law also provided that the court, previously to passing on the representation, should order notice to be given to all parties, or their guardians; and it directed that before a sale the administrator should enter into bond, and give a certain prescribed notice of the sale. Several of these requirements are made under a proviso, which, according to the case of *Voorhees v. Bank*, 10 Pet. 449, make them as conditions precedent to the exercise of the power.

Objections were made on all the above points that the fulfillment of these requirements did not appear on the face of the record, nor in the papers. The court say the whole merits of the controversy depend on one single question: Had the county court of Brown county jurisdiction of the subject on which they acted? They define jurisdiction, citing *United States v. Arredondo*, 6 Pet. 709; *Kelly v. Jackson*, Id. 623; *Rhode Island v. Massachusetts*, 12 Id. 718; *Ex parte Tobias Watkins*, 3 Pet. 205. They style this a proceeding *in rem*, citing *McPherson v. Cunniff*, 11 Serg. & R. 422, and say that the jurisdiction of orphans' courts, and all courts who have power to sell the estates of intestates, is irrespective of the parties in interest. The court then proceed to say that no other requisites to the jurisdiction of the county court are prescribed than the death of Grignon, the insufficiency of his personal estate to pay his debts, and a representation thereof to the court making these facts appear. Their decision was the exercise of jurisdiction which was conferred by the representation that it did then appear to the court that there were facts and reasons before them which brought their power into action, and that it was exercised by granting

the prayer of the petitioner; and if the decree does not specify the facts and reasons, nor refer to the evidence on which they were made to appear to the judicial eye, they must have been, and the law presumes they were, such as to justify their action:" citing *Philadelphia & Trenton R. R. Co. v. Stimpson*, 14 Pet. 458. The recitation of facts in the license is referred to, but that is not so full as the order of the court in the case at bar. They say: "After the court has passed on the representation of the administrator, the law presumes that it was accompanied by the certificate of the judge of probate, as that was a requisite to the action of the court; their order of sale is evidence of that, or any fact which was necessary to give them power to make it; and the same remark applies to the order to give notice to the parties. This is a familiar principle in ordinary adversary actions, in which it is presumed, after verdict, that the plaintiff has proved every fact which is indispensable to his recovery, though no evidence appears on the record to show it; and the principle is of more universal application in proceedings *in rem* after a final decree by a court of competent jurisdiction over the subject-matter. The granting the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial, if no appeal is taken. The rule is the same, whether the law gives an appeal or not. The record is absolute verity, to contradict which there can be no averment or evidence. The court having power to make the decree, it can be impeached only by fraud in the party who obtains it: *United States v. Arredondo*, 6 Pet. 729. A purchaser under it is not bound to look beyond the decree. . . . These principles are settled as to all courts of record which have an original general jurisdiction over any particular subject. They are not courts of special or limited jurisdiction; they are not inferior courts, in the technical sense of the term. That applies to courts which are created on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction. The true line of distinction between courts whose decisions are conclusive if not removed to an appellate court, and those whose proceedings are nullities if their jurisdiction does not appear on their face, is this: a court which is competent by its constitution to decide on its own jurisdiction, and to exercise it to a final judgment without setting forth in its proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the con-

trary, is of the first description. There can be no judicial inspection behind the judgment, save by appellate power." "The court," they say, "has a right to decide every question which occurs in a cause;" citing *Elliot v. Peirsol*, 1 Id. 328; "and such," they add, "must hereafter be taken to be the established law of judicial sales, as well relating to those made in proceedings *in rem* as in *in personam*;" citing *Voorhees v. Bank of United States*, 10 Pet. 473. "Titles acquired under the proceedings of courts of competent jurisdiction must be deemed inviolable in collateral actions, or none can know what is his own."

The case of *Perkins v. Fairfield*, 11 Mass. 227, which is several times cited in the cases in the federal court, was decided in accordance with the rules set forth in the above cases from Peters and Howard, although it was decided before them. The license is granted to administrators by the court of common pleas, upon a certificate from the judge of probate not warranted by the circumstances of the estate, and the administrators did not give bond as required by statute. The supreme court say: "That court had jurisdiction of the subject-matter. If that jurisdiction was improvidently exercised or in a manner not warranted by the evidence from the probate court, yet it is not to be corrected at the expense of the purchaser, who had a right to rely upon the order of the court as an authority emanating from a competent jurisdiction." It is not easy to determine with clearness how to class the above case of *Grignon v. Aslor*, 2 How. 819. It certainly bids defiance to the rule that a superior court acting in a special matter, out of the course of its common-law jurisdiction, acts as a court of inferior and limited jurisdiction. It must be classed either as a case giving to the superior court in such cases the full weight of the presumptions which belong to its common-law jurisdiction, or as one which considers all such cases as proceedings *in rem*. And either of these grounds may be predicated of it. This case and the rules adopted in the others from the supreme court of the United States seem to take away the grounds and reasoning of many of the cases decided in the state courts. And in truth, there is a necessity that some superior power should lay hands on them and marshal them into order, or prescribe rules to which they should be squared; for it is doubtful whether a rule can be extracted from them. It is probable that the rules laid down in the foregoing federal cases will be found subversive of the great mass of the state cases.

A few other cases will be referred to, bearing more immedi-

ately upon the points before suggested: *Ludlow v. Johnson*, 8 Ohio, 553; *Goforth v. Longworth*, Id. 129; *Ewing v. Higby*, 7 Id. 198 [28 Am. Dec. 633]; *Le Grange v. Ward*, 11 Id. 257; *Adams v. Jeffries*, 12 Id. 253; *Paine v. Mooreland*, 15 Id. 435 [45 Am. Dec. 585]; *Robb v. Irwin*, Id. 689; *Bloom v. Burdick*, 1 Hill (N. Y.), 130 [37 Am. Dec. 299]; *Corwin v. Merritt*, 3 Barb. 341; *Ranoul v. Grif-fie*, 3 Md. 54. Many cases treat these distinctly as proceedings in rem, even when the statute provides for notice. Such are *Grignon v. Astor*, *supra*; *McPherson v. Cunliff*, 11 Serg. & B. 432; *Adams v. Jeffries*, *supra*; *Tongue v. Morton*, 6 Har. & J. 23; *Ewing v. Higby*, 7 Ohio, 201; *Perkins v. Fairchild*, *supra*; *Robb v. Irwin*, *supra*; *St. Clair v. Morris*, 9 Id. 19 [34 Am. Dec. 415]; and all those cases, impliedly, which give emphasis to the fact of the court having jurisdiction of the subject-matter; and such it undoubtedly is in its nature, for it certainly is not an adversary proceeding.

Without finally determining whether a superior court, acting in a special matter, is to be treated as an inferior and limited court, we find in the foregoing investigation some method by which the case before us may be determined by rule, and not on detached cases only. When a power is given to a court over a special subject which is not in the usual course of the common law, and a mode is prescribed, such mode must be pursued, whether the tribunal be a superior or inferior one; and sufficient must appear to show the case to be within the reach or jurisdiction of the tribunal. Whether in the case of a superior court, this sufficiently appears by the statute conferring the power, and the common-law presumptions in favor of such a court (a petition being first filed to call up the power), the state and federal courts seem to differ widely. If, however, sufficient appears on the face of the record (or proceedings) of the court to give it jurisdiction under the law conferring the power, then the presumption attaches in favor of the remainder of the proceedings of the court, whatever that court may be. But whether, and in what cases, the facts stated in the record may be contradicted, remains in doubt, even as regards an inferior court: See 1 Smith's Lead. Cas., 5th ed., note, 820, 821, 824, 842. If there be a petition, on the proper matter of that nature, to call into action the power or jurisdiction of the court, the sufficiency of it cannot be called into question collaterally. This is for the appellate power only. If there be a notice or publication, or whatever of this nature the law requires in reference to persons, its sufficiency cannot be questioned collaterally: Id. 837, 843;

Shelden v. Wright, 5 N. Y. 497; *Borden v. State*, 11 Ark. 519 [54 Am. Dec. 217]; *Ewing v. Higby*, *supra*; *Paine v. Mooreland*, *supra*; *Wright v. Marsh*, 2 G. Greene, 109.

The questions made in the case at bar may be quickly settled under those rules, so far as they are to determine them. The first objection made to the proceedings of the district court is that it had jurisdiction of neither the subject-matter nor the parties. We do not understand that a serious question is made as to the jurisdiction over the subject, for the authority to grant such a license is given by both the acts before referred to. Next is the want of notice to the parties, as is alleged; that is, to the minors, or to the next of kin. Chapter 11, section 8, of the second act referred to, provides that "no such license shall be granted until notice, by public advertisement or otherwise, as the court shall order, shall have been given to the next of kin of the ward, and to all persons interested in the estate," etc. This is the section applicable here, and it may be doubted whether it intends a notice to the wards. But at all events, it is sufficiently answered by the record, which finds "that the court [among other things], being satisfied from publication, properly filed, that the notice required by law has been given," orders, etc. This chapter does not require personal service. The above is sufficient to give jurisdiction, at least until contradicted by proof; and we do not now decide whether such proof could be received. As to the objection that the petition should lie over one term, and the publication should be made between the terms, we do not understand that this practice relates to matters of this kind—matters of a probate nature. But however that may be, the sufficiency of the notice is a question for appeal, and cannot be brought up collaterally. So far as these objections go, the sale will have to be sustained, unless we find difficulty in the act of 1843, c. 11, sec. 20. It is as follows: "In case of an action relating to any estate sold by a guardian under the provisions of this chapter, in which the ward, or any person claiming under him, shall contest the validity of the sale, the same shall not be avoided on account of any irregularity in the proceedings, provided it shall appear: 1. That the guardian was licensed to make the sale by a court of competent jurisdiction; 2. That he give bond (approved), in case one was required by the court granting the license; 3. That he took the oath prescribed in this chapter; 4. That he gave notice of the time and place of the sale, as prescribed herein; 5. That the premises were sold accordingly, at public auction, and are held by one

who purchased them in good faith." One of the leading purposes of the preceding investigation is to ascertain how the required matters must or may appear, and in what sense the word "appear" may be taken in the foregoing statute. Upon this we are satisfied. The next inquiry is as to whether the provisions of the above section 20, of chapter 11, statutes of 1843, are to be taken as peremptory, or as directory only. It is true that the argument in favor of the directory character of this section is countenanced by the penalty provided by the next section, in case of any neglect or misconduct in the proceedings of the guardian, by which any person interested shall suffer damage. But the reasoning, on the other hand, is too weighty to be overcome by this consideration. In the first place, why are these provisions in the statute? Do they not bear a specific meaning? Do they mean no more than the settled rules would have taught without them? Do they not at once impress the mind as peremptory requirements? The language is that "the sale shall not be avoided on account of any irregularity in the proceedings, provided that it shall appear that the five following facts exist. Does not this language admit of this change of proposition? The sale shall not be avoided for any irregularities except in the following particulars, and therefore that the sale may be avoided on account of irregularities in the following particulars; and again, that the sale may be avoided, provided the following facts do not appear. The sense manifestly is that the sale shall not be held void for minor irregularities, nor for any such, if certain leading requirements are observed. But these must be observed. The contrary reasoning would be this, and no other: the sale shall not be avoided if these things appear (which is by statute); and if they do not appear, the sale will be sustained upon adjudicated principles.

By this process, it is brought to pass that whether they appear or not is immaterial, since in the one case the statute sustains the sale, and in the other the adjudicated cases. This fritters away the statute, and makes it mean nothing. But we believe it was written and enacted to have its appropriate effect, and however the rules of law and the adjudicated cases might dispose of these matters if this section did not exist, and however important we may esteem it to sustain sales of this description when it can be done fairly, our duty now is only to square this case by these provisions and find how it bears the test, and pronounce accordingly. As to the first condition, we have found that the guardian was licensed by a court of competent jurisdic-

tion. As to the second, no bond was required by the court. The third is, "that he took the oath that is prescribed in this eleventh chapter," section 11. Such guardian shall also, before fixing on the time and place of sale, take and subscribe an oath, in substance like that required to be taken by executors, administrators, and guardians when licensed to sell real estate. This clearly refers to section 11 of chapter 10, where the oath is given, and it is "that in disposing of the estate which he is licensed to sell he will use his best judgment in fixing on the time and place of sale, and that he will exert his utmost endeavors to dispose of the same in such manner as will be most for the advantage of all interested therein." Without the foregoing provision of the twentieth section, on which we are commenting, such an oath simply required might be presumed after a confirmation of the sale, on the principles of the cases before cited; but under this statute there can be no such presumption. The importance of this requirement is not for us to decide; but we can see its fitness, in the present case at least, when it is in evidence that the sale was made to the husband of the guardian. There is no evidence either in the record or in the papers, nor is any brought to our knowledge *aliunde*, that this oath was taken. The guardian makes a report of her sale, but does not state it. There is a judgment confirming the sale, but this goes no further than to say (in allusion to the report), "which having been examined by the court here, and the court being fully advised of and concerning the premises, it is ordered," etc. The statute says it must "appear" that she took this oath, and the least we can require is that the record shall aver it; or that it should appear otherwise. The above record does not answer the call of the statute.

As to the fourth requirement, "that she gave notice of the time and place of sale as prescribed." This refers to section 12 of chapter 10, which we think refers to the act of 1839, Stats. 1843, p. 433, sec. 11, which provides that the court shall direct the notice. In this case the court directed a notice of the sale, and the report recites that she advertised "according to law." But there is no such notice returned among the papers, nor any other evidence of its having been given. But on the strength of some of the cases above cited, we are inclined to think that this allegation in the report, followed by the confirmation, a part of which is above quoted, is sufficient *prima facie*. As to the fifth condition, "that the premises are held by one who purchased them in good faith," we are disposed to consider this

as meaning one who holds them at the time of the action, and not as referring to the original purchaser solely; and there is nothing tending to show that the defendants did not purchase in good faith.

Therefore, because it does not appear that the guardian took the oath required by the statute, the sale must be held void. This result dispenses with the necessity of considering the other points in the cause.

The judgment of the district court is affirmed.

NOTE BY COURT.—We desire to say to the profession, both for this and other causes, that our access to books is very limited. We cannot therefore in this case determine the correctness of the citations of many of the cases in the note in 1 Smith's Leading Cases, but we give them that others having better opportunities may examine.

EVERY PRESUMPTION OBTAINS IN FAVOR OF JUDGMENTS of courts of general jurisdiction: *Suiter v. Turner*, 10 Iowa, 526, citing the principal case; *Gunn v. Howell*, 62 Am. Dec. 785, note 791; *Horan v. Wahrenberger*, 58 Id. 145, note 148, where other cases are collected.

NOTHING IS INTENDED IN FAVOR OF JURISDICTION OF INFERIOR COURT, but if the jurisdiction is shown, everything will be intended in favor of the judgment: *Gunn v. Howell*, 62 Am. Dec. 785, note 791. Its judgments then stand on the same footing as those of superior courts: *Shawham v. Loffer*, 24 Iowa, 228; *Smith v. Engle*, 44 Id. 269, both citing the principal case.

WHERE COURT HAS ACQUIRED JURISDICTION OF CAUSE, full credence is to be given to the subsequent proceedings, and no subsequent irregularity will invalidate them: *Little v. Sinnett*, 7 Iowa, 330; *Davenport M. S. F. & L. A. v. Schmidt*, 15 Id. 216; *Ballenger v. Tarbell*, 16 Id. 493; *Pursley v. Hayes*, 22 Id. 37; *Shawham v. Loffer*, 24 Id. 226; *De Tar v. Boone Co.*, 34 Id. 491; *Lyon v. Vanatta*, 35 Id. 525; *Ryan v. Varga & B. & M. R. R. Co.*, 37 Id. 81. *Bennett v. Hetherington*, 41 Id. 150; *Tharp v. Brennenman*, Id. 254; *Farmers' Ins. Co. v. Highsmith*, 44 Id. 333, all citing the principal case. The sufficiency of the notice, or whatever else is necessary in reference to persons, to give the court jurisdiction, cannot be questioned collaterally: *Bonsall v. Iselt*, 14 Id. 312, citing the principal case. A notice, though defective, is sufficient to give the court jurisdiction: *Commissioners of Clay Co. v. Markle*, 46 Id. 112; *Muncey v. Yoest*, 74 Id. 412; *Little v. Sinnett*, 7 Iowa, 330; *Ballinger v. Tarbell*, 16 Id. 493; *Hahn v. Kelly*, 34 Cal. 428; all citing the principal case.

WHERE COURT OF GENERAL JURISDICTION HAS SPECIAL AUTHORITY conferred upon it by statute, it is *quoad hoc* an inferior or limited court: *Gunn v. Howell*, 62 Am. Dec. 785, note 791.

WHERE JURISDICTIONAL FACTS DO NOT APPEAR OF RECORD, their existence may be proved *aliunde*: *Williams v. Cammack*, 61 Am. Dec. 508. But if the record shows that a judgment was rendered when no jurisdiction had been acquired over the subject-matter or the person, it is void, and will be so treated in a proceeding direct or collateral: *Boker v. Chapline*, 12 Iowa, 206, citing the principal case; *Horan v. Wahrenberger*, 58 Am. Dec. 145, note 149, where other cases are collected.

THE PRINCIPAL CASE IS REFERRED TO in *Morrow v. Weed*, 4 Iowa, 87, and in *Fraser v. Steenrod*, 7 Id. 340, for a discussion of the law relating to the

collateral impeachment of proceedings of courts. In *Long v. Burnett*, 13 Id. 35, it is said that the principal case has gone as far to sustain guardians' sales as the courts generally in this country have done. In *State v. Berry*, 12 Id. 60, it is referred to as having fully discussed the doctrine of presumptions in favor of the regularity of the proceedings of courts of inferior jurisdiction. And it is cited in *Thornton v. Mulquinne*, Id. 554, to the point that the absence from the record of probate proceedings of the oath of the administrator, required by the statute, is fatal to the title of the purchaser at an administrator's sale.

GOWER v. CARTER.

[3 Iowa, 244.]

AGREEMENT TO PAY SUM OF MONEY BY DAY CERTAIN, AND MORE THAN LEGAL INTEREST afterwards by way of penalty if the debt be not punctually paid, is not usurious.

NO OTHER SUM CAN NOW BE RECOVERED UNDER PENALTY than that which will compensate the plaintiff for his actual loss.

PROMISE TO PAY PENALTY BEYOND AMOUNT OF LEGAL INTEREST on money loaned cannot be enforced.

DAMAGES FOR MERE NON-PAYMENT OF MONEY CAN NEVER BE SO LIQUIDATED between the parties as to evade the provisions of the law which fix the rate of interest.

WHERE JUDGMENT IS RENDERED FOR MORE THAN PARTY IS ENTITLED TO RECOVER, the appellate court will correct the error, even where the judgment below was by default.

ACTION on three promissory notes, each of which contained this stipulation: "If not paid punctually when due, we promise to pay as a penalty for the default two and a half per cent per month from maturity till paid." The other facts sufficiently appear from the opinion.

I. M. Preston, for the appellants.

Clarke and Henley, for the appellees.

By Court, STOCKTON, J. The first question arising in this cause is as to the correctness of the decision of the district court in sustaining the demurrer to defendant's answer.

The answer is certainly most inartificially drawn. It is clearly insufficient in the facts it sets forth, to show that there was anything usurious in the contract between the parties, whereby defendants agreed to pay the several sums of money when the promissory notes respectively fell due. If the contract was usurious, the plaintiffs, under section 5, act of February, 1853, Sess. Acts, 68, would only have been entitled to judgment for the principal sum loaned, without interest or costs. The contract

itself is not rendered void. The object of the defendants, then, should have been to have stated such facts as would have shown the contract usurious, in order to avoid the payment of the interest and cost. But there are no facts alleged to show that there had been any substantial payment or agreement to pay more than the law allows, either for the use of money lent, or for the forbearance of money due and payable. The agreement to pay the penalty of two and a half per centum per month, in default of payment of the principal sum and interest when due, formed no part of the consideration of the several promissory notes, or either of them, and consequently does not affect them with the taint of usury. The agreement was in its language and terms a penalty to secure the faithful performance of the original contract. If this contract had been performed by the defendants, and the money paid according to the tenure and effect of their undertaking, at the time the promissory notes fell due, there would clearly have been no usurious interest paid or received. The defendants then had it in their power to obviate the objectionable feature of the contract of which they complain, and by their own act free the promissory notes of the supposed taint of usury to which they now object. Where a party agrees to pay a sum of money by a day certain, and more than legal interest afterwards by way of penalty if the debt be not punctually paid, such agreement is not usurious. The authorities to support this point are numerous, and we refer to the following, among others: *Wight v. Shuck*, Morris, 425; *Shuck v. Wight*, 1 G. Greene, 128; *Lawrence v. Cowles*, 13 Ill. 577; *Wells v. Gerling*, 1 Brod. & B. 447; *Brockway v. Clark*, 6 Ohio, 45; *Cutler v. How*, 8 Mass. 257; *Gambril v. Doe*, 8 Blackf. 140 [44 Am. Dec. 760]; *Kelly on Usury*, 76; *Parsons on Mercantile Law*, 256; 2 *Parsons on Contracts*, 293. This contract, therefore, not being in our opinion usurious, the demurrer to defendants' answer was properly sustained by the court.

It appears from the record that in the further progress of the cause, after sustaining the demurrer to so much of the defendants' answer as was intended to set up the defense of usury, the court rendered judgment for the plaintiff for three thousand four hundred and twenty-seven dollars and forty cents, being for the amount of the notes and interest to maturity, together with the penalty of two and a half per centum per month. It is now assigned for error by the defendants, that this judgment is for too great a sum; that the plaintiff was entitled to judgment for the amount of the notes and interest only; and that the

court should not have included in the judgment the penalty of two and a half per centum per month.

The defendants' agreement to pay the two and a half per centum per month as a penalty in default of payment of the promissory notes at their maturity is not essentially different from an agreement to pay a gross sum as such penalty. Nor do we perceive that either of the notes sued on is essentially different from a penal bond by which the obligor binds himself to pay the obligee a certain sum, with a condition appended by which the first obligation is to be void on the payment of the lesser sum to the obligee by a day certain. The real nature and essence of the agreement is always disclosed by the condition of the bond or undertaking.

In the present case, the condition of the contract was to pay the notes with interest by a certain day. If not paid punctually when due, defendants promise to pay as a penalty for the default two and a half per centum per month from maturity until paid. Are the plaintiffs entitled to enforce this penalty against the defendants on their failure to pay the notes at their maturity? We may first remark, however, that on examination of the petition we find that it does not set forth any breaches on the part of defendants, as on a penal bond. It does not aver what amount is claimed by plaintiffs as due from the defendants; nor does it pray judgment for the amount of the penalty. We refer to this in connection with the question made by defendants in their assignment of errors, viz., whether the court should have rendered judgment for the penalty of two and a half per centum per month; and if not, for what amount should judgment have been rendered.

The consideration of this question renders it advisable to inquire to some extent into the nature and history of actions for penalties, and on penal obligations. In an action of debt on a penal bond for condition broken, the amount which the plaintiff was entitled to recover was originally the penalty. The action could not be relieved against either by payment or tender. This severe rule of the common law was only mitigated by the practice of the courts of chancery, which interposed and would not allow the creditor to take more than in conscience he ought: *Sedgwick on Damages*, 393. From the time that it became settled in equity that the condition of the bond was the agreement of the parties, the obligor was relieved from the penalty. Very soon arose the practice, enforced by legislation, requiring the plaintiff to assign breaches in his declaration, and

the jury on the trial assessed such damages for the breaches assigned as the plaintiff on the trial might prove. And it is enacted by the code of Iowa, section 1818, that "in actions on penal bonds the petition must set forth the breaches, and the judgment rendered thereon must be for the actual damages only." It may therefore be laid down as a settled rule, that no other sum can now be recovered under a penalty than that which shall compensate the plaintiff for his actual loss. The penalty is in no sense the measure of compensation; and the plaintiff must show the particular injury of which he complains, and have his damages assessed by a jury. Such damages, it is further held, are not necessarily nominal, and the jury may give substantial damages, if they see fit: Sedgwick on Damages, 396, 397.

In the case of a loan of money, although in point of fact a creditor may suffer the most serious inconvenience for the want of punctual payment of his debt, as happens every day, and a subsequent payment of principal and interest may be a very inadequate compensation for the original disappointment, it may be stated as a general rule, that a promise of paying a penalty beyond the amount of legal interest cannot be enforced: 2 Pothier on Obligations, appendix, 87. Where the penalty has been incurred, the ends of justice may be arrived at, by reducing the penalty to the actual debt: 2 Parsons on Contracts, 393. The case of *Groves v. Groves*, 1 Wash. 1, was an agreement for the payment of a debt at a certain day, and if not paid punctually, then for the payment of a larger sum; the court held that a contract to pay a larger sum at a future day was not usurious, and that the increased sum should be considered as a penalty against which equity ought to relieve, on compensation being made. So in *Brockway v. Clark*, 6 Ohio, 45, the supreme court of Ohio held that where a money-lender takes from a borrower an obligation for a greater amount than the money lent and stipulated interest, with an undertaking on his part to receive a less sum in discharge of the obligation, if punctually paid, equity may relieve against the excess as a penalty, on the same principle upon which parties are ordinarily relieved from penalties.

The same was granted at law in Massachusetts, in the case of *Culler v. Howe*, 8 Mass. 257. After a verdict by the jury for the plaintiff, assessing the damages, the court directed a certain amount of the penalty, which it deemed oppressive, to be deducted from the amount ascertained by the verdict, and judgment was entered on the verdict as amended. In *Shuck v. Wight*,

1 G. Greene, 128, the note was for the sum of three hundred dollars, payable two years after date, and to bear interest after maturity, if not paid, at the rate of fifty per centum per annum. Suit being brought by the holder of the note to foreclose the mortgage given to secure its payment, the petition prayed judgment for the amount of the note, with such interest as the court should deem just and proper. Judgment was given for the plaintiff for the amount of the note, and interest at six per centum per annum. This judgment was affirmed by the supreme court: *Shuck v. Wight, supra*; and we may consider that the principle was thereby settled, so far as the authority of this court could settle it, that the plaintiff was not entitled to judgment for the penalty of fifty per centum per annum, but for six per cent only.

In another class of cases, where the parties have agreed upon a sum as a measure of damages, in order as far as possible to avoid all future questions as to the amount of damages which may result from the violation of the contract; and where a definite sum was named, as settled and liquidated, if the construction of the phraseology would work oppression, the use of the term "liquidated damages" did not prevent the courts from inquiring into the actual injury sustained, and doing justice between the parties. No damages for the mere non-payment of money can ever be so liquidated between the parties as to evade the provisions of the law which fix the rate of interest: *Sedgwick on Damages*, 400.

In *Orr v. Churchill*, 1 H. Black. 232, Lord Loughborough said: "There can only be an agreement for liquidated damages where there is an agreement for the performance of certain acts, the not doing of which would be injurious to one of the parties; or to guard against the performance of acts which, if done, would also be injurious. But in cases like the present, the law, having fixed by positive rules the rate of interest, has bounded the measure of damages." In the case of *Gray v. Crosby*, 18 Johns. 226, where a party covenanted, on a certain contingency, to pay to another a sum of money, with a proviso that if he failed or refused, then he would pay a larger sum as liquidated damages, the supreme court of New York say: "Such facts constitute no right to recover beyond the money actually due. Liquidated damages are not applicable to such a case. If they were, they might afford a secure protection for usury, and countenance oppression under the forms of law." On a consideration of these authorities, we have no hesitation in coming to

the conclusion that the district court erred in rendering judgment against defendants for the penalty of two and a half per centum per month stipulated in the notes. The plaintiff was entitled to recover only the several sums agreed to be paid, with the interest at the rate of ten per centum per annum; and the cause being heard on the petition and exhibits only, the judgment should have been for the money actually due, without the addition of the penalty.

The judgment having been rendered without any objection made to it in the district court, and without any effort there to correct or reduce the amount of the damages, we have inquired whether the defendants can now ask to have the same corrected in this court, and assign for error that the judgment was for too great a sum. The questions made by defendants, however, we think, arose properly in this case, and the errors are well assigned. Even when the judgment below has been by default, this court will correct any errors apparent on the face of the proceedings; as when the judgment is for more than is claimed by the plaintiff, or where, as in this case, it is for more than he is rightfully entitled to recover: *Roberts v. Smith*, Morris, 417; *Doolittle v. Shelton*, 1 G. Greene, 271.

The judgment of the district court will therefore be reversed.
Judgment reversed.

STIPULATION IN NOTE TO PAY HIGHER RATE OF INTEREST AFTER MATURITY: See note to *Horn v. Nash*, 63 Am. Dec. 439, where this subject is discussed. A stipulation in a note on time, that if the amount thereof is not paid at maturity it shall bear interest from date, is not usurious, nor against sound policy: *McNairy v. Bell*, 24 Id. 454.

WHETHER SUM AGREED TO BE PAID IS LIQUIDATED DAMAGE OR PENALTY: See note to *Graham v. Bickham*, 1 Am. Dec. 331, where this subject is discussed at length. On a penal bill, an action for the sum actually due may be maintained without any reference to the penalty: *Holley v. Holley*, 12 Id. 342.

USURY DEFINED: See note to *Zeigler v. Scott*, 54 Am. Dec. 400; note to *Davis v. Garr*, 55 Id. 392.

PENALTY FOR FAILURE TO PAY NOTE AT MATURITY: See note to *Davis v. Garr*, 55 Am. Dec. 392, where this subject is discussed.

MORTGAGE IS NOT USURIOUS which stipulates for five per cent damages, besides the legal interest, upon a sale of the premises, if the debt is not paid at maturity, the damages being in the nature of a penalty for want of punctuality: *Gambriel v. Doe*, 44 Am. Dec. 760. In *Weatherby v. Smith*, 30 Iowa, 132, and in *McGill v. Griffin*, 32 Id. 447, both citing the principal case, it was decided that a stipulation in a note secured by mortgage for the payment of an attorney fee in the event of default in payment, and the institution of a suit to foreclose the mortgage, does not make the note usurious.

ANY LOSS IMPOSED ON BORROWER IN ADDITION TO AMOUNT LEFT and lawful interest, whatever form it may assume, is a violation of the law restricting the lender to a specified rate of interest: *Clague v. Creditors*, 20 Am. Dec. 300.

THE PRINCIPAL CASE IS CITED IN *Trosel v. Clarke*, 9 Iowa, 202, to the point that the law will prevent the recovery of usurious interest on a contract, but when it becomes a judgment, the case is changed.

ABRAMS v. FOSHEE.

[3 IOWA, 274.]

TO MAINTAIN ACTION OF SLANDER, CONSEQUENCE OF WORDS SPOKEN must be to occasion some injury or loss to the plaintiff, either in law or fact. ACCUSATION IS ACTIONABLE WHICH, IF PROVED, WOULD SUBJECT PARTY FALSELY ACCUSED to a punishment which would bring disgrace upon him.

TO CAUSE OR PROCURE ABORTION BEFORE CHILD IS QUICK is not a criminal offense at common law.

INFANT IN VENTRE SA MERE IS NOT HUMAN BEING within the meaning of section 2508 of the Iowa code, which provides that whoever kills any human being with malice aforethought, either express or implied, is guilty of murder.

TO CHARGE PERSON WITH CAUSING OR PROCURING ABORTION is not actionable *per se*, when there is no law punishing such act at the time of the speaking of the words.

SUPREME COURT WILL NOT ALLOW PARTY TO BE PREJUDICED by the refusal of the trial court to give a correct instruction, because the same may possibly have been given in instructions which have been lost without his fault.

SLANDER for the following words spoken by the defendant's wife of and concerning the wife of the plaintiff: "She is a bad woman; she has destroyed, with instruments, children since she has been here; she has destroyed one or two children since she has been here; she takes medicine and kills her children; she destroys her children." In one count these words were charged to have been spoken: "She is not a decent woman; she has sexual intercourse with other men." No special damages were claimed. The defendants demurred to the petition on the ground that the words charged were not actionable *per se*. The demurrer was overruled. There was a verdict and judgment for the plaintiff, and the defendants appealed. It appeared from the clerk's certificate that the instructions in chief given to the jury had never been returned by them, and what those instructions were was not shown in any way. The other facts are stated in the opinion.

Palmer and Trimble, for the appellants.

O. C. Nourse, and Knapp and Caldwell, for the appellee.

By Court, WRIGHT, C. J. But one question is presented for our consideration by appellants, and that is, whether words charging a woman with causing or producing an abortion are actionable in this state.

The appellees claim, first, that as the instructions in chief are not before us, we cannot say but that the instructions asked by appellants were refused because they had been previously given. The whole record rebuts any such presumption. The overruling of the demurrer, which raised substantially the same questions, clearly shows that on this point the court could not have instructed in chief as requested by appellants. And then again, these instructions are asked in so many different forms, and refused in all, that we can hardly suppose that the same view had been taken in the previous instructions. But still further, we would be unwilling to allow a party to be prejudiced by the refusal of the court to give a correct instruction because the same may possibly have been given in instructions which have been lost without his fault.

It is next claimed by appellees that one count charges the defendant's wife with having been guilty of adultery; that the proof may have been confined to that count alone; and if so, the instructions asked were properly refused, on the ground of their inapplicability. The whole record, however, so unmistakably shows that the words charging the abortion were those relied upon for a recovery, that we should be doing violence to suppose the instructions were refused as being inapplicable; and especially so as nothing of the kind is intimated by the judge trying the cause when refusing such instructions. We conclude, therefore, that the question is fairly presented, whether the instructions asked were correct, and should have been given.

To maintain an action of slander, the consequence of the words spoken must be to occasion some injury or loss to the plaintiff either in law or fact. As the declaration in this case claims no special damages, or a loss or injury in fact, we are left to inquire whether the charge referred to in the instructions refused was of such a character as to amount to an injury in law. To determine this, it becomes material to ascertain in what cases this action may be maintained without proof of special damages. Starkie, in his work on slander, page 9, lays down the rule that such action may be maintained "when a person is

charged with the commission of a crime; when an infectious disorder is imputed; and when the imputation affects the plaintiff in his office, profession, or business." In this case, we only need examine the rule so far as it relates to the charge of a crime. And what is that rule? In *Cox v. Bunker, Morris*, 269, the supreme court of this territory recognized the rule laid down in *Miller v. Parish*, 8 Pick. 385, as the proper one. And in that case it is said that "whenever an offense is charged which, if proved, may subject the party to a punishment, though not ignominious, but which brings disgrace upon the party falsely accused, such an accusation is actionable. And this is perhaps as correct and at the same time as brief a statement of the general rule as has been given. For while the rule is variously stated by different authors and judges, yet in all of them it is laid-down-as necessary that the charge shall impute a punishable offense. To this there may be an exception in that class of cases where the words relate to the reputation of a female for chastity. But of such charges we shall have occasion to speak hereafter.

With this rule in view, then, we are to determine whether to charge a woman with procuring an abortion in this state since the first of July, 1851, is actionable *per se*. By the statute of 1843, the willful killing of an unborn quick child, by any injury, etc., was made manslaughter: R. S. 1843, 167, sec. 10. This was repealed by the code, which took effect July 1, 1851. Since that time it is conceded we have no law punishing this offense by name. But it is claimed that such a child is a human being, within the meaning of section 2508, which provides that whoever kills any human being, with malice aforethought, either express or implied, is guilty of murder. If this be so, then the charge would clearly impute a punishable offense, and would be actionable *per se*. But in this view we cannot concur. It will be observed that one of the instructions asked and refused was that to charge a woman with causing an abortion was not actionable *per se* in this state since the first of July, 1851. The other is to the same effect, except that it uses the words "before the child is quick." By abortion we understand the act of miscarrying, or producing young before the natural time, or before the fetus is perfectly formed. And to cause or produce an abortion is to cause or produce this premature bringing forth of this fetus. And notwithstanding the infant in *ventre sa mere* is treated by the law for some purposes as born, or as a human being, yet we are not aware that it has been so treated so far as

to make the act of causing its miscarriage murder unless so declared by statute. And certainly, independent of statute, it is not a punishable offense when the child is not quick in the womb. When the child is born, however, it becomes a human being within the meaning of the law; and if it shall then die, by reason of any potions or bruises it received in the womb, it would be murder in those who administered or gave them with a view of causing the miscarriage.

In Russell on Crimes, it is said that "an infant in the mother's womb, not being *in rerum natura*, is not considered as a person who can be killed, within the description of murder; and therefore, if a woman, being quick or great with child, take any potion to cause an abortion, or if another give her any such potion, or if a person strike her, whereby the child within her is killed, it is not murder or manslaughter:" Russell on Crimes, 390. The statute of 43 Geo. III., c. 58, provided, however, for the punishment of such offenses, making the offense when the child is quick in the mother's womb capital, and if not quick, a felony. The law is stated thus by Blackstone in his commentaries, vol. 1, p. 129: "If a woman is quick with child, and by a potion or otherwise killeth it in her womb, and she is delivered of a dead child, this, though not murder, was by the ancient law homicide or manslaughter. But the modern law doth not look upon this offense in quite so atrocious a light, but only as a heinous misdemeanor." To support an indictment for infanticide at common law, the rule as uniformly recognized is that it must clearly appear that the child was wholly born, and was born alive, having an independent circulation and existence: 3 Greenl. Ev., sec. 136. If a woman be quick with child, and by a potion or otherwise killeth it in her womb, and she is delivered of a dead child, this is a great misprision, and no murder: 3 Co. Inst. 50. In *Commonwealth v. Parker*, 9 Met. 263 [43 Am. Dec. 396], it is held not to be a punishable offense by the common law to perform an operation upon a pregnant woman with her consent for the purpose of procuring an abortion, and thereby to effect such purpose, unless the woman is quick with child. And to the same effect is the case of *Commonwealth v. Bangs*, 9 Mass. 387. See also the case of *State v. Cooper*, 22 N. J. L. 52 [51 Am. Dec. 248], where this subject is very fully discussed, and many of the authorities collected. These authorities agree in holding that to cause or procure an abortion before the child is quick is not a criminal offense at common law, whatever it may be after the child is

quick. And we think it to be equally true that an infant *in ventre sa mere* is not a human being within the meaning of section 2508 of the code. It is certainly not such before it is quick in the womb.

To charge a woman with causing or procuring an abortion is not, therefore, to charge her with the crime of murder under our law; and there being no law punishing such an act in this state at the time the words were spoken, we think the instructions asked were improperly refused.

The counsel for appellees claim, however, that the ruling of the court below is sustained by the case of *Daily v. Reynolds*, 4 G. Greene, 354. The opinion in that case we have not been able to see, and cannot, therefore, say with certainty how far it is applicable. We understand, however, that the words spoken in that case imputed a want of chastity to the plaintiff, who was an unmarried female, and that the ground assumed substantially was that such a charge would tend necessarily to exclude her from society, and render her infamous in the common sense of that term; and that such a charge was actionable on the broad, plain ground that it would immediately and necessarily tend to hinder her advancement in life. And notwithstanding this may be regarded as a departure from the general rule heretofore stated, we have no disposition to question its correctness. It is sustained by not a few well-considered cases, and is founded in reason and justice. It has its origin, and receives its sanction, in that just jealousy and care with which the reputation of the female for chastity is guarded in every civilized community. It is true that courts hesitated in departing this much from the general rule, and many of them still hold that in the absence of a statute punishing adultery and fornication, words imputing a want of chastity are not actionable. And while we concur in what we understand to be the ruling in the case of *Daily v. Reynolds*, *supra*, we do not think it can aid the plaintiff in this action. We think the reasoning and argument in support of the actionable character of such a charge cannot apply to the one alleged to have been made in this case. It is true that to charge a woman with such an act might injure her in the estimation of the community. And so might many other charges affect her good name, and yet not amount to the charge of a crime, so as to be actionable, without the averment and proof of special damages. To say of her that she was a common tattler or liar, or that she indulged in the use of profane or vulgar language, that she was a drunkard, or the like, would reasonably,

if believed, have a tendency to bring her into disrepute; but such words are not actionable *per se*. But to impute to her a want of chastity is to charge her with the want of that without which the female is necessarily and certainly driven beyond the circle of virtuous friends and acquaintances. Such a case is an exception to the general rule, is sustained by reasons that apply to it alone, because of the peculiar character of the charge, and beyond it we are not willing to go at present.

The case of *Malone v. Stewart*, 15 Ohio, 319 [45 Am. Dec. 577], we do not believe to be law. It has not been followed, as far as we have been able to examine, by any other court; but on the contrary, its correctness has been denied or questioned, and we think with propriety: 1 Am. Lead. Cas. 116.

Judgment reversed.

CRIME OF CAUSING ABORTION.—Bouvier defines abortion to be "the expulsion of the fetus at a period of utero-gestation so early that it has not acquired the power of sustaining an independent life." By the ancient common law of England, the killing of a child in its mother's womb was regarded as homicide or manslaughter. "But the modern law," says Blackstone, "doth not look upon this offense in quite so atrocious a light, but merely as a heinous misdemeanor:" 1 Bla. Com. 129; 1 Whart. Crim. L., 8th ed., sec. 592; *State v. Cooper*, 22 N. J. L. 52; S. C., 51 Am. Dec. 248. The common law seems to have regarded the procuring of an abortion as solely an offense against life. And as the life of the child, in contemplation of that law, commenced when the child began to stir in the womb, it seems to be settled by the greater weight of authority that the procuring of an abortion with the mother's consent was not an indictable offense at common law, unless the mother was at the time quick with child: *Hatfield v. Gano*, 15 Iowa, 178, citing the principal case; *State v. Moore*, 25 Id. 128; *Mitchell v. Commonwealth*, 78 Ky. 204; S. C., 39 Am. Rep. 227; *Smith v. State*, 33 Me. 48; S. C., 54 Am. Dec. 607; *Commonwealth v. Bangs*, 9 Mass. 387; *Commonwealth v. Parker*, 9 Met. 263; S. C., 43 Am. Dec. 396; *State v. Cooper*, 22 N. J. L. 52; S. C., 51 Am. Dec. 248. In the case of *Mitchell v. Commonwealth*, *supra*, Hines, J., who delivered the opinion of the court, after an extended examination of the authorities on this point, said: "In the interest of good morals and for the preservation of society, the law should punish abortions and miscarriages willfully produced at any time during the period of gestation. That the child shall be considered in existence from the moment of conception for the protection of its rights of property, and yet not in existence until four or five months after the inception of its being to the extent that it is a crime to destroy it, presents an anomaly in the law that ought to be provided against by the law-making department of the government. The limit of our duty is to determine what the law is, and not to enact or declare it as it should be. In the discharge of this duty, and after a patient investigation, we are forced to the conclusion that it never was a punishable offense at common law to produce, with the consent of the mother, an abortion prior to the time when the mother became quick with child." But in *State v. Slagle*, 83 N. C. 630, and in *Mills v. Commonwealth*, 13 Pa. St. 631, it was decided that at common law the procuring of an abortion at any stage of pregnancy was a punishable misdemeanor.

Coulter, J., delivering the opinion of the court in *Mills v. Commonwealth*, 13 Pa. St. 633, said: "The next error assigned is that it ought to have been charged in the count that the woman had become quick. But although it has been so held in Massachusetts and some other states, it is not. I apprehend, the law in Pennsylvania, and never ought to have been the law anywhere. It is not the murder of a living child which constitutes the offense, but the destruction of gestation by wicked means and against nature. The moment the womb is instinct with embryo life, and gestation has begun, the crime may be perpetrated." The learned judge has here undoubtedly given a correct exposition of what the law ought to be. And the spirit of modern legislative enactments on the subject shows that the doctrine enunciated by him has met with general approbation. But a careful examination of the cases already cited, and the authorities therein reviewed, compels the conclusion that the doctrine enunciated by the learned judge was not the doctrine of the common law on this subject. It must not be supposed that the procuring of an abortion upon a pregnant woman without her consent was not an offense at common law, even where the child had not quickened. On the contrary, the use of violence upon a pregnant woman at any stage of her pregnancy was regarded by the common law as an aggravated assault, and as such was indictable: *Commonwealth v. Parker*, 9 Met. 203; S. C., 43 Am. Dec. 396; *State v. Cooper*, 22 N. J. L. 52; S. C., 51 Am. Dec. 248. And after the child became quick, the law, as we have seen, made it a heinous misdemeanor to destroy its life.

The reason why the causing of an abortion before the quickening of the child was not, if done with the consent of the mother, regarded as an offense by the common law, is no doubt to be found in the ignorance of medical science that prevailed when the rule was first established. For while the common law for certain civil purposes regarded an infant as in being from the time of conception, yet it never seemed to regard it as in life, or to have respect to its preservation as a living being, until after it had quickened in its mother's womb. A forcible illustration of this fact is to be found in the law in relation to the reprieve of a mother convicted of a capital offense. In such a case the jury of twelve matrons were directed to find whether or not the prisoner was quick with child, for barely with child was not enough, unless it were alive in the womb: See 4 Bla. Com. 395. Another instructive fact in this connection is that the earlier statutes, both in England and in this country, recognize a distinction between the condition of the child before and after quickening, and provide a severer punishment for the destruction of a child after it has quickened than they do for the destruction of a child before it has quickened: See 43 Geo. III., c. 58; 9 Geo. IV., c. 31; 1 Russell on Crimes, 9th ed., 900; 2 R. S. N. Y., 1829, sec. 661; R. S. Ohio, 1804, sec. 252; R. S. Conn., 1838, sec. 145; while in the recent statutes this distinction has been, in almost every case, abolished: See 24 & 25 Vict., c. 100, sec. 58, and the statutes of the several states in this country. Thus in *Commonwealth v. Wood*, 11 Gray, 85, it was decided that the Massachusetts act of 1845, c. 27, was intended to supply the defects of the common law, and to apply to all cases of pregnancy, and it makes no difference whether the child had quickened or not. In *Wilson v. State*, 2 Ohio St. 319, it was held that under the Ohio act of 1834 the crime may be committed at any time during gestation. In *State v. Howard*, 32 Vt. 380, it was held not necessary to the commission of the offense prohibited by Comp. Stat. Vt., c. 108, sec. 8, that the fetus should be alive, but that the phrase "pregnant with child" applies to every stage of pregnancy. And in *State v. Fitzgerald*, 49 Iowa, 260; S. C., 31 Am.

Rep. 148, it was decided that it was not essential to the guilt of the accused that the woman upon whom the offense was committed should be quick with child. In delivering the opinion of the court in that case, Rothrock, C. J., said: "The defendant asked the court to instruct the jury that the crime could not be committed upon a woman who was not quick with child. The instruction was, we think, correctly refused. The statute makes no such qualification. The crime consists in attempting to produce the miscarriage of any pregnant woman. The crime is complete if the attempt be made at any time during pregnancy." So, by the statute of Maine, it is equally criminal to produce an abortion before and after quickening: *Smith v. State*, 33 Me. 48; 8 C., 54 Am. Dec. 607. But the New York statute of 1869, c. 63, which makes the killing of an unborn child manslaughter, still maintains the distinction between a child before and after quickening. For the child under that statute is held not to be the subject of manslaughter until it has quickened. And on an indictment under the statute for causing the death of an unborn infant by an attempt to produce a miscarriage, the quickening of the child in the mother's womb must be averred and proved: *Evan v. People*, 49 N. Y. 86.

WHAT CONSTITUTES OFFENSE.—The language of the statutes of the different states describing the offense varies somewhat, but they nearly all provide that whoever, with the intent to produce the miscarriage of any pregnant woman, unlawfully administers, or causes to be given to her, any drug or noxious substance whatever, or unlawfully uses any instrument or means whatever, with such intent, shall be guilty of the offense. In some of the statutes the words used are, "willfully administers any drug or substance whatever." Of course, where this language is used in the statute the offense may be committed by administering any substance with intent to produce abortion, whether such substance be noxious or not, and whether it be capable of producing the intended effect or not. Thus, in *State v. Fitzgerald*, 49 Iowa, 260, 8 C., 31 Am. Rep. 148, it was held to be no defense that a harmless substance was employed, provided the guilty intent existed. Rothrock, C. J., delivering the opinion in that case, said: "The evidence tended to show that the substance used in the attempt to produce the miscarriage was tobacco, and that the instrument used was a syringe. The medical witnesses testified that tobacco was not such a substance as would produce the result intended. The court refused to instruct the jury that the defendant could not be convicted unless the substance administered was such as would produce a miscarriage. In this we think there was no error. The statute provides that the administering of 'any substance,' with the criminal intent, shall constitute the crime. A party who, with the necessary criminal intent, uses any substance to produce a miscarriage, surely cannot be held innocent because he mistakenly administered a drug or substance which did not produce the result intended. It is the intent, and not the 'substance' used, that determines the criminality." See, to the same effect, *State v. Owens*, 23 Minn. 238; *Wilson v. State*, 2 Ohio St. 319; *Commonwealth v. W—*, 3 Pittsb. 461. Where a statute uses the words "poison, or other noxious thing," in describing the offense, it seems that the substance must be shown to be noxious in its nature: 1 Russell on Crimes, 901; *Regina v. Isaacs*, Leigh & C. C. C. 220. In this case it was held that supplying an innocuous drug, whatever may be the intent of the person supplying it, is not an offense against 24 & 25 Vict., c. 100, sec. 59. And Pollock, C. B., delivering the opinion, said: "A mere guilty intention is not sufficient to constitute a crime; there must be an intent, coupled with an overt act, tending to the perpetration of the crime."

This case, however, seems to overrule the decision in *Rex v. Coe*, 6 Car. & P. 403, in which Vaughan, B., said: "If the prisoner administered a bit of bread merely with intent to procure abortion, it is sufficient to constitute the offense contemplated by the act of parliament." But even where the thing administered must be shown to be noxious, it is not necessary to prove that it would produce the effect intended by the person who administers it with guilty intent: *Dougherty v. People*, 1 Col. 514; *State v. Gedcke*, 43 N. J. L. 86. Scudder, J., delivering the opinion of the court in the latter case, said: "The poison, drug, medicine, or other thing must be noxious or hurtful; if it possesses this quality, and is administered, prescribed, advised, or directed to be taken with the intent to cause or procure a miscarriage when the woman is pregnant with child, the crime is complete, whether in the opinion of others it is capable of producing that result or not. It is dangerous to the life and health of the mother and to the existence of the child to experiment with any drug, medicine, or noxious thing, to produce a miscarriage. The ignorance of the operator may lead him to select something that will not have the effect he designs; but if it be noxious in any degree, though in the judgment of others who have greater knowledge it cannot produce the effect intended, it is within the statute."

In *Dougherty v. People*, *supra*, it was held that if the substance administered is unwholesome, and may probably occasion injury or derangement of the system to a pregnant woman, it is noxious within the meaning of the statute. It seems, too, that a substance which if taken in minute quantities might be harmless may become noxious within the meaning of the law by being administered in quantities sufficiently large to produce injurious effects upon a pregnant woman. Thus in the case of *Regina v. Still*, 30 U. C. C. P. 30, the prisoner, with intent to procure an abortion, supplied a pregnant woman with two bottles full of "Sir James Clarke's Female Pills," with directions to take twenty-five at a dose, and with assurances that they would have the intended effect. It appeared from the evidence that the pills contained oil of savin, in about the proportion of four grains to a bottle full. It was in evidence that such a quantity of savin would be greatly irritating to a pregnant woman, and might possibly procure an abortion, and that oil of savin in any dose would be dangerous to give to a woman in that condition. It was held that under the circumstances there was a supplying of a noxious thing within the meaning of the statute. And Wilson, C. J., delivering the opinion, said: "It seems to me that a thing may be or become noxious by the quantity of it taken or administered as well as by the quality of the article itself." In the case of *Queen v. Cramp*, L. R., Q. B. Div., decided in 1880, it appeared that the prisoner had caused half an ounce of the oil of juniper to be taken with intent to procure an abortion. The medical testimony went to show that small quantities of the oil of juniper would not have been injurious, but that it was dangerous to a pregnant woman to take it in the quantities in which the prisoner had administered it to her. Opinions were delivered by four of the judges. Lord Coleridge, C. J., said: "The intent with which the oil of juniper was given was proved, and it was further proved that it was noxious in the quantity administered. . . . In the present case, the oil of juniper as administered was noxious." Denman, J., said: "Where a person administers with the improper and forbidden intent a large quantity of a thing which so administered is noxious, though when administered in small quantities it is innocuous, the case falls within the statute." Field, J., said: "If the thing administered is a recognized poison, the offense may be committed though the quantity given is so small as to be incapable of doing harm." And Stephen,

J., said: "Everything which is noxious is a 'noxious thing.' With regard to the meaning of 'poison,' there are certain things which have acquired the name of poisons, and as to these, possibly, if a small quantity only were administered the administration might come within the statute." But in *Queen v. Perry*, 2 Cox C. C. 223, in a prosecution under 7 Wm. IV. and 1 Vict., c. 6, sec. 85, it was held that a small quantity of savin not sufficient to do more than produce a little disturbance of the stomach is not a "noxious thing," within the meaning of those statutes.

CRIMINAL INTENT with which a substance is administered, or an instrument is used, is the important consideration in determining the guilt or innocence of a party accused of procuring an abortion. If the intent to procure the miscarriage is proved, the party charged is guilty, although the means employed by him are inadequate to produce the effect intended by him: *Dougherty v. People*, 1 Col. 514; *Commonwealth v. Morrison*, 16 Gray, 224. Chapman, J., in delivering the opinion in the latter case, said: "It was urged in argument that by this construction of the statute a person may be punished for advising a woman to swallow an article as harmless as bread or water. This is indeed true; but if the party knows their quality, and that they have no tendency to procure the miscarriage, then the criminal intent cannot exist. He must believe they have some tendency to produce the desired result, otherwise it is impossible that his advice to the woman to take them should be with intent thus to produce it. If he has such a belief, it may well be that the legislature has thought fit to punish him for thus tampering with a woman's health and life, though he may be utterly mistaken as to the character and effect of the medicines. And if it were necessary for the government to prove the quality of the medicines, it might often be difficult to convict offenders who had used the most noxious drugs." Where the intent exists, it is not necessary to the establishing of the guilt of the accused to show that an abortion has been actually produced. An unsuccessful attempt to produce an abortion is an indictable offense: *Bishop on Statutory Crimes*, sec. 744; *State v. Slagle*, 82 N. C. 653; *Smith v. State*, 33 Mo. 48; S. C., 54 Am. Dec. 607. Nor is it essential to the perpetration of the offense that the woman was actually pregnant when the attempt to procure an abortion was made upon her: *Queen v. Goodhall*, 1 Den. Cr. C. 187; S. C., *sub nom. Regina v. Goodchild*, 2 Car. & K. 293; *Commonwealth v. Taylor*, 132 Mass. 261. In the former of these cases the prisoner was indicted for using a certain instrument with intent to procure the miscarriage of a woman. The woman upon whom the instrument was used died shortly after, and it appeared on the examination of the body after death that she was not pregnant at the time when she was operated upon. The court held that it was immaterial whether she was or not. In the case of *Regina v. Hillman*, Leigh & C. C. C. 343, the prosecutrix, to whom the noxious drug was intended to be administered, and for whom it was obtained by the prisoner, never intended to take it; but the court held that the intent of no other person than that of the defendant himself was necessary to the commission of the offense made punishable by 24 & 25 Vict., c. 100, sec. 58. Under the Massachusetts statute, c. 165, sec. 9, it is not necessary to allege or prove an intent to kill the child. It is not descriptive of the offense, or of the acts which constitute the offense, and if alleged in the indictment it may be rejected as surplusage: *Commonwealth v. Snow*, 116 Mass. 47. But to justify the conviction of a party for procuring abortion, the intent to produce the abortion must exist at the time when the act was done. A man who beats his wife while she is pregnant, and so causes her to miscarry, cannot be convicted of

procuring an abortion when he had no idea that such a result would follow from his act, and never intended or desired such a result: *Slattery v. People*, 76 Ill. 217.

NEITHER NAME, QUALITY, OR QUANTITY OF DRUG or other substance administered with intent to procure an abortion, nor the name of the instrument used with like intent, need be alleged in the indictment or proved on the trial: *Rex v. Phillips*, 3 Camp. 74; *Dougherty v. People*, 1 Col. 514; *State v. Fowler*, 7 Blackf. 592; *State v. Fitzgerald*, 49 Iowa, 280; *Commonwealth v. Morrison*, 16 Gray, 324; *State v. Owens*, 22 Minn. 238; *State v. Van Houten*, 37 Mo. 357; *Commonwealth v. W—*, 3 Pittsb. 462; *Watson v. State*, 9 Tex. App. 237. And if the indictment sets out the name of the drug that was administered, it is not necessary that the proof shall correspond with the allegation in that respect: *Dougherty v. People*, 1 Col. 514. Nor is it necessary to prove that the drug used would produce abortion, or that the woman to whom it was given was at the time pregnant, if the prisoner believed that she was, and administered the drug with intent to procure abortion: *Rex v. Phillips*, 3 Camp. 74. A statement in the verdict of a jury, that the ingredients of the substance which the defendant induced the woman to take with intent to procure an abortion are unknown to the jury, does not affect the finding that he did procure her to take something with intent then and there thereby to produce a miscarriage: *State v. Owens*, 22 Minn. 238.

WOMAN UPON WHOM ABORTION IS PRODUCED IS NOT ACCOMPLICE, technically speaking, of the party who administers to her the substance intended to produce the abortion, or performs upon her the operation with the like intent, although such act may have been done with her consent and even at her solicitation. The law regards her rather as the victim of than as a participant in the criminal act: *Commonwealth v. Wood*, 11 Gray, 85; *Commonwealth v. Brown*, 121 Mass. 69; *State v. Owens*, 22 Minn. 238; *State v. Hyer*, 39 N. J. L. 568; *Dunn v. People*, 29 N. Y. 523. In *State v. Hyer*, *supra*, it was decided that a request to charge the jury "that if this witness took the medicine with intent to procure an abortion she was an accomplice, or *particeps criminis*, and as such her evidence alone would not be sufficient for the jury to base a conviction on," was properly refused. But while a pregnant woman who willfully takes medicine to produce abortion upon herself is not an accomplice of the party who advises her to take it, yet her moral implication is a proper matter to be considered in weighing her testimony. And where the acts producing the abortion are done by her solicitation and with her consent, this fact may be considered by the jury as affecting her credibility as a witness against the party charged with the offense: *Commonwealth v. Brown*, 121 Mass. 69. But in this case it was decided that a request to charge the jury that they should take her statements "with great circumspection and caution and discredit" was properly refused. Of course the fact that the abortion was produced by the procurement or consent of the woman in no way lessens the criminality of the act itself when proved: *Commonwealth v. Snow*, 116 Mass. 47; *Commonwealth v. Wood*, 11 Gray, 85. In the case of *People v. Josselyn*, 39 Cal. 393, it was decided that where the only evidence is the testimony of the woman on whom the attempt to produce an abortion was made, it must be corroborated in respect to some of the material facts which constitute a necessary element of the crime. The defendant in that case was a practicing physician at the time of the commission of the alleged offense, and the decision was rendered under the California statute of 1861, which expressly provided that no physician or surgeon should "be arrested, indicted, or put on trial, or convicted by the testimony of such woman

alone." Cal. Stats. 1861, p. 588. This provision has not been retained in the penal code of California. A party who advises a pregnant woman to take medicine to procure an abortion is not an accomplice with her: *State v. Murphy*, 27 N. J. L. 112. In the case of *Watson v. State*, 9 Tex. App. 237, it was shown that when the defendant stated to the father of the pregnant woman that he could give her a drug that would remove the child, the father replied: "All right; anything to save my child." This was held to render the father an accomplice with the defendant.

INDICTMENT FOR PROCURING ABORTION.—It is not necessary to aver, in an indictment under the New Jersey statute of 1849, that the woman actually took or swallowed the drug or medicine advised to be taken: *State v. Murphy*, 27 N. J. L. 112. "Advising to take the potion is the overt act made criminal by the statute:" Green, C. J., delivering the opinion in *Id.* 115. An indictment is sufficient, although it does not aver that the woman swallowed the drug which the defendant procured her to take with intent to produce abortion: *State v. Owens*, 22 Minn. 238. Averments in an indictment under the Massachusetts statute of 1845, c. 27, that the defendant provided ergot, and advised, ordered, and commanded two other persons to administer it to the woman then and there quick with child, and by so ordering, commanding, and advising, and by the taking and swallowing such ergot into her stomach by the woman, he did administer the same to her unlawfully, and without lawful justification, and with intent to cause and procure her to miscarry and be prematurely delivered of said child, constitute a full and distinct allegation that he committed the offense prohibited by the statute, and thus charge him directly as the principal felon, and not as the accessory of others in the perpetration of the offense set forth in the indictment: *Commonwealth v. Brown*, 14 Gray, 419. An indictment which charges the defendant with administering ergot, and with using instrument with intent unlawfully to procure miscarriage, and thereby actually procuring it, sets forth only one offense, and is not objectionable on the ground of duplicity: *Id.* An indictment which in one count charges that the defendant administered to a pregnant woman some drug, and in another count charges that she employed some instrument with intent thereby to procure a miscarriage of said woman, sufficiently charges a misdemeanor, under the New York statute of 1845: *People v. Lohman*, 2 Barb. 216; *People v. Stockham*, 1 Park. Cr. 124. An indictment which, after alleging the commission of the crime of abortion by some person unknown, charges that the defendant, before the abortion was committed, "did feloniously and maliciously incite, move, and procure, did counsel, hire, and command the said person as aforesaid unknown, the said felony and abortion, in manner and form aforesaid, to do and commit," sufficiently charges the defendant with being an accessory before the fact: *Commonwealth v. Adams*, 127 Mass. 15. An indictment which charges the defendant with forcing and thrusting a certain instrument, the name of which is unknown to the jury, up into the womb and body of a pregnant woman, with intent thereby to cause and procure an abortion, is sufficient: *Commonwealth v. Jackson*, 15 Gray, 187; *Commonwealth v. Snow*, 116 Mass. 47. And so is an indictment which charges the defendant with forcing and thrusting such an instrument, with like intent, into the private parts of a pregnant woman: *Baker v. People*, 105 Ill. 452. An indictment charging that the defendant unlawfully and willfully employed and used in and upon the body and womb of a pregnant woman a certain instrument called a catheter, with intent to produce a miscarriage, it not being necessary for the preservation of her life, is sufficient: *State v. Sherwood*, 75 Ind. 15. A count in an indict-

ment which alleges that the defendant procured the woman to engage in immoderate and excessive exercise in order to bring about a miscarriage, sufficiently charges the offense under the Pennsylvania act, which prohibits the use of any unlawful means whatever for the purpose of procuring miscarriage: *Commonwealth v. W—*, 3 Pittab. 461. It is not necessary to aver in an indictment that the defendant knew of the noxious character of the drug: *State v. Slagle*, 83 N. C. 630. In an indictment under the New York act of 1841, relative to abortions, it is necessary to allege the intent to destroy the child: *People v. Lohman*, 2 Barb. 619. But an indictment under the Massachusetts general statutes, c. 165, sec. 9, for causing a woman to miscarry, need not allege either that the woman did or did not die: *Commonwealth v. Thompson*, 108 Mass. 461.

At common law, an indictment must allege that the woman was quick with child: *Commonwealth v. Bangs*, 9 Mass. 387; *contra: Mills v. Commonwealth*, 13 Pa. St. 631. But such allegation is not necessary under the Massachusetts statute of 1843, c. 27: *Commonwealth v. Wood*, 11 Gray, 85. In *State v. Owens*, 22 Minn. 238, it was held that an indictment for procuring an abortion was not insufficient because it alleged in the alternative the use of different means in the commission of the crime. But in *State v. Drake*, 30 N. J. L. 422, it was held that an indictment under the New Jersey act of 1849 must charge that the defendant did the acts in the statute specified with intent to cause and procure the miscarriage, and that both words must be used conjunctively to charge the intent which the statute makes a crime. In that case it was held that a charge in the indictment that the defendant administered a certain poison, or drug, or medicine, or noxious thing, was bad, because it did not charge that he administered the whole of the prohibited things nor any one of them. The offense of administering a drug to a pregnant woman with intent to produce miscarriage, and that of administering it with intent to kill the child, are distinct offenses; hence an indictment for such administering with intent to produce miscarriage is good for the misdemeanor, although it is bad for the felony of manslaughter by killing the child: *Lohman v. People*, 1 N. Y. 379; S. C., 49 Am. Dec. 340. It was an answer to an indictment under section 2 of 43 Geo. III., c. 58, that the woman was not pregnant, although the defendant believed that she was, and gave her the drug with intent to produce miscarriage: *Rez v. Scudder*, 1 Moo. C. C. 216; S. C., 3 Car. & P. 605. Where the statute under which the indictment is found contains an exception, it will be necessary for the indictment to negative the exception: *State v. McIntyre*, 19 Minn. 93; *Moody v. State*, 17 Ohio St. 110; *State v. Stokes*, 54 Vt. 179. But where the act makes it a criminal offense for any one to cause an abortion unless it is caused by a regular practitioner of medicine, an indictment against two persons, which alleges that they were not regular practitioners of medicine, negatives the exception in the statute: *Hays v. State*, 40 Md. 633. And an averment that the procurement of the miscarriage was not necessary to preserve the life of the woman is equivalent to an averment that the miscarriage was not necessary to preserve her life: *Willey v. State*, 52 Ind. 246. In an indictment under the Texas code for destroying the life of an infant during the parturition of the mother, and before it was actually born, it is not necessary for the indictment to negative the existence of the circumstances which would justify the act under the code: *State v. Rupe*, 41 Tex. 33.

EVIDENCE IN PROSECUTIONS FOR PROCURING ABORTION.—Upon the trial of one indicted under the New York act of 1872, c. 18, for causing the death of a woman by using an instrument upon her with intent to produce miscarriage,

It is not necessary for the people to show that the use of the instrument was not necessary to preserve the life of the woman or of the child, but the burden of proving such necessity for its use rests on the accused: *Bradford v. People*, 20 Hun, 309. Where the defendant, being applied to by a pregnant woman for something to produce her miscarriage, procures and gives to her a drug, which she takes, and it produces miscarriage, although it was not taken in the defendant's presence, it is sufficient evidence of a "causing to be taken" to justify his conviction: *Regina v. Wilson*, 1 Dears. & B. C. C. 127; *Regina Farrow*, Id. 164. Declarations made by the woman upon whom the abortion was produced, to the physician who examined her, are admissible in evidence as part of the facts upon which his opinion is founded: *State v. Geddicke*, 43 N. J. L. 86. On the trial of an indictment for procuring, counseling, and commanding A B to cause a miscarriage, evidence that the defendant wrote to A B that he wanted to put a female friend under her treatment; that he took a woman who was pregnant by him to A B's house and left her there; that A B caused the woman to miscarry; that the defendant afterwards told A B to get help and take care of the woman if she needed it; and that he subsequently took the woman away, and paid A B fifty dollars—is sufficient to warrant the defendant's conviction: *Commonwealth v. Thompson*, 108 Mass. 461.

On a trial for procuring the miscarriage of H., evidence was held admissible that the defendant, on being told by the mother of H. that the latter was pregnant, replied, "Send her to me," and added that he had operated successfully five times on one person: *Commonwealth v. Holmes*, 103 Mass. 440. Upon the trial of an indictment for procuring abortion causing death, the prosecution, after proving the pregnancy of the deceased, interviews between her and the defendant, and that he gave her drugs, offered in evidence a circular issued and circulated by the defendant about two years before, advertising that he could be consulted in relation to the producing of miscarriages, and advising females who should consult him how the same could be kept secret, and they be protected from criminal punishment. It was held by the court of appeals that there was no error in admitting this evidence, over the objection of the defendant, for the purpose of showing guilty knowledge of the character of the drugs, and their probable effect, and that he gave them for the purpose of producing the abortion: *Weed v. People*, 56 N. Y. 623. A speculum chair and other instruments adapted to use in procuring abortions, found in the defendant's possession, are admissible in evidence, for the same reason that upon a trial for burglary, burglars' tools found in the possession of a defendant are admissible: *Commonwealth v. Brown*, 121 Mass. 69; *Commonwealth v. Blair*, 126 Id. 40. If a party takes a girl to a house of ill-fame, and there causes an abortion to be produced upon her, the character of the house may be given in evidence on his trial for the offense, in order that the jury may know whether the place is one where such a crime would be consummated without much danger of detection and punishment: *Hays v. State*, 40 Md. 650. What the deceased said after she left the private room in which she was operated upon, and when she was not in apprehension of death, is not admissible in evidence. It is not part of the *res gestæ*, but merely part of a past transaction: *Hays v. State*, *supra*; *Maine v. People*, 9 Hun, 113; *Davis v. People*, 2 Thomp. & C. 212. Declarations of the deceased, tending to show that the defendant was innocent, and the deceased alone responsible, are not admissible under the rule that declarations against the interest of the party making them are admissible against him. The interest, under that rule, must be a pecuniary one: *Maine v. People*, *supra*. On the trial of an indictment for advising a

pregnant woman to procure a miscarriage, it is not material that another person besides the prisoner had connection with the woman: *Crichton v. People*, 1 Abb. App. Dec. 467. But where, on such a trial, the defendant, after shaking the credit of the prosecuting witness, the woman upon whom the offense was committed, by his counsel states to the court that he intends to claim that another man was the father of the child, this other man may be asked whether or not he ever had sexual intercourse with the woman: *Dunn v. People*, 29 N. Y. 523.

A wife is a competent witness against her husband, or against him and another jointly, charged with procuring an abortion upon her: *State v. Dyer*, 59 Me. 303. And so is a wife a competent witness against a person accused of producing an abortion upon her at her husband's command: *Commonwealth v. Reid*, 8 Phila. 385. A woman may conspire with others to procure a miscarriage of her own person, and the conspiracy being shown, her acts and declarations in furtherance of the common design are evidence against those engaged with her in the criminal act: *Solander v. People*, 2 Col. 48. On an indictment charging the defendant with advising a pregnant woman to take "Dr. James Clarke's Pills," evidence that he recommended her to take "Dr. Clarke's Pills" is not a variance: *Crichton v. People*, 1 Abb. App. Dec. 467. In *Commonwealth v. W—*, 3 Pittsb. 462, the defendant offered in evidence a certificate, sworn to by the woman upon whom the alleged offense was charged to have been committed, in which she stated that the defendant had never held improper relations with her. But it was held that the commonwealth was not concluded by the statements contained in the certificate.

DYING DECLARATIONS, ADMISSIBILITY OF.—Where death ensues from the procuring of the abortion, the authorities are not agreed as to whether the dying declarations of the woman are admissible in evidence against the defendant. Where death is an element of the offense, it is held in the following cases that the dying declarations of the woman are admissible: *Montgomery v. State*, 80 Ind. 338; *Maine v. People*, 9 Hun, 113; *Davis v. People*, 2 Thomp. & C. 212; *Commonwealth v. Bruce*, 5 Crim. Law Mag. 680, Phila. Q. S., 1884. But see, *contra*, *People v. Davis*, 56 N. Y. 95; *State v. Harper*, 35 Ohio St. 78.

WOMAN WHO COMMITS ABORTION ON HERSELF is, by 24 & 25 Vict., c. 100, sec. 58, liable to the same punishment as one who procures an abortion on another. But generally the statutes of the several states in this country do not provide for the punishment of a woman who commits an abortion on herself: Bishop on Statutory Crimes, sec. 749; *Hatfield v. Gano*, 15 Iowa, 177. But the California penal code, sec. 275, makes it a felony for a woman to solicit of any person any medicine, drug, or substance whatever, and take the same, or to submit to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life.

WORDS ACTIONABLE PER SE AS IMPUTING CRIME: See *St. Martin v. Desmoyer*, 61 Am. Dec. 494, note 498, where other cases are collected. Words imputing want of chastity to a female are actionable *per se*: *Cleveland v. Detweiler*, 18 Iowa, 300; *State v. Moore*, 25 Id. 132, both citing the principal case. To charge a woman with procuring an abortion on herself was not sufficient to charge her with a crime, under the Iowa code of 1851: *Hatfield v. Gano*, 15 Id. 178, citing the principal case.

YOST v. DEVAULT.

[3 IOWA, 245.]

SUBSEQUENT ADOPTION OF REAL ESTATE AS HOMESTEAD cannot affect the validity of the owner's undertaking to sell and convey it, or release him from his obligation entered into before it was made a homestead.

WHERE REPLICATION DENIES MATTERS CONTAINED IN PLEA, it is error to dismiss the bill without hearing the issue of fact thus raised.

BILL in chancery to enforce specific performance of a contract for the conveyance of real estate. Respondent alleged in his plea that it is impossible for him to convey the premises, because they are held by him as a homestead; that his wife refuses to execute a deed of the premises; that the defendant now claims the same as a homestead; and that the wife of defendant has filed her claim to the said premises as a homestead in the recorder's office of Polk county. The complainant filed a demurrer, and also a replication in denial. The demurrer was overruled, and the cause dismissed. Plaintiff appealed.

Jewett and Hall, for the appellant.

O. Bates, for the appellee.

By Court, WRIGHT, C. J. The order dismissing the suit was clearly erroneous. The replication denied the matters contained in the plea, and an issue of fact was thus formed which should have been heard. But we also think that the court erred in overruling the demurrer. The code provides that a conveyance of the homestead is of no validity unless the husband and wife concur in and sign the same, and this homestead is required to embrace the house used as a home: Secs. 1247, 1250. Assuming for the purpose of this case that a bond by the husband for the conveyance of the homestead upon certain conditions could not be enforced if resisted on the ground that it included or contemplated the disposition of such homestead, still this plea makes no such defense. It contains no averment that the property named in the bond was the homestead at the time it was executed. For anything that is shown by the pleadings, this property did not become the homestead until long after this contract was made. If not the homestead at the time of the agreement to convey, no subsequent adoption of it as such could affect the validity of the respondent's undertaking, or release him from his obligation.

Without examining the other errors assigned, we conclude that, for those referred to, the judgment must be reversed.

WHAT NECESSARY TO CONSTITUTE HOMESTEAD: See *Charles v. Lamber-son*, 63 Am. Dec. 457, note 463, where other cases are cited.

HOMESTEAD, HOW MAY BE MORTGAGED: See *Lee v. Kingsbury*, 62 Am. Dec. 546, note 550, where other cases are collected.

HOMESTEAD CANNOT BE CONVEYED BY HUSBAND ALONE, without the wife's joining in the conveyance: *Taylor v. Hargous*, 60 Am. Dec. 606.

ABANDONMENT OF HOMESTEAD: See *Taylor v. Hargous*, 60 Am. Dec. 606, note 607, where this subject is discussed at length.

THE PRINCIPAL CASE IS CITED IN *Kers v. Brusch*, 13 Iowa, 375, to the point that the subsequent adoption of real estate as a homestead cannot affect the validity of a trust deed thereof previously made, nor release the parties to such deed from its operation; and in *Davis v. Kelley*, 14 Id. 527, to the point that where there has been a clear and actual abandonment of the homestead, a creditor of the owner may equitably and justly conclude the exemption no longer attaches to the premises. The principal case again came before the court, and is reported in 9 Iowa, 60.

CONGER v. DEAN.

[3 IOWA, 463.]

ISSUE OF FACT RAISED BY PLEADINGS CANNOT BE ADJUDICATED ON MOTION to dismiss the cause.

COURT IS NOT BOUND TO GIVE IRRELEVANT INSTRUCTIONS, and their relevancy must be affirmatively shown by the party complaining.

COMMON-LAW RIGHT TO SUBMIT, BY PAROL, MATTERS IN CONTROVERSY between parties to arbitration has not been taken away by the provisions of the Iowa code governing those awards which are designed to be reported to the court for judgment and execution.

SUBMISSION TO ARBITRATION MUST BE MADE IN MANNER REQUIRED BY LAW if the parties wish to ask the aid of the court to enforce the award. But if they do not wish to ask such aid, they may, without complying with the regulations of the code, make a submission by which they will be bound.

SUBMISSION TO ARBITRATION IN MANNER DIFFERENT FROM THAT REQUIRED BY CODE may be regarded as the means mutually adopted by the parties for an amicable settlement of their difficulties, and should have the force and effect of a settlement made by the parties themselves. In such a case, if there is a failure to comply with the agreement to submit or with the terms of the award, the remedy is by action either on the agreement or award. And the award may be set up as a defense to an action prosecuted for the matter therein settled.

AWARD OF ARBITRATORS MAY BE AVOIDED by proof that it was made without notice to one of the parties to the submission, or that the agreement to submit was fraudulently obtained.

ACTION commenced in the justice's court, and by the defendant appealed to the district court, where he moved to dismiss the cause, offered certain testimony which was rejected, and asked

for certain instructions, which were refused. Judgment was rendered for the plaintiff, and the defendant appealed. The other facts are stated in the opinion.

Charles Negus, for the appellant.

S. W. Summers, for the appellee.

By Court, WRIGHT, C. J. The motion to dismiss the cause was correctly overruled. It was based upon the fact that the parties had submitted the subject-matter of the suit to arbitration, upon which there had been an award in favor of defendant, as shown by his answer filed before the justice. This was denied, however, by plaintiff, as appears by the justice's transcript, and a written replication found in the record. And thus was raised an issue of fact, which could only be determined like any other fact in the case, and could not be adjudicated on a motion to dismiss. There is nothing to show us that the instructions asked and refused had any application to the case. No part of the testimony is before us; and under such circumstances, we cannot say that the court erred in refusing them. A court is not bound to give irrelevant instructions, and their relevancy must be shown affirmatively by the party complaining. The question as to the admission of the testimony arises on the following state of facts:

The plaintiff sues for the value of an ox, which he charges was killed by defendant. After the suit was commenced before the justice, as defendant claims, the parties, by their agreement in writing, submitted the matters in controversy to the arbitration of five persons named therein. On the trial before the justice, this agreement was set up, with the further averment that a majority of said arbitrators had by their written award found the defendant not guilty. These averments were put in issue by the plaintiff. In the district court, defendant proposed to introduce this agreement and award to sustain his defense, which, being objected to, was rejected by the court. The grounds upon which the court acted in rejecting this testimony is not shown, nor have counsel in their argument pointed out the objections relied upon. It is probable, however, that the rejection was based upon the fact that the submission was not made in the manner required by the code; and thus the question arises, whether a submission and award will be good as between the parties, though they may not have pursued the course pointed out by the code on that subject. And briefly, we understand that if parties wish to ask the aid of the court

for judgment upon an award, they must submit in the manner required by our law. But if they do not, a submission without complying with the regulations of the code may be made, by which the parties will be bound.

By the common law of the land, parties may by parol submit any matters in controversy between them to arbitration; and this right has not been taken away by the provisions of the code governing those awards which are designed to be reported to the court for judgment and execution. There is nothing in chapter 119 taking away this right, either in express words or by implication. This chapter is similar in its terms to that found in many of the states, and we understand it to have been frequently, if not uniformly, held under such statutes that parties were not necessarily confined to such provisions in submitting matters in controversy to arbitrators, but that they may adopt other methods which will be equally obligatory to them. When submitted by parol, or in a manner different from that required by the code, it may be regarded as the means mutually adopted by the parties for an amicable settlement of their difficulties, by the aid and assistance of their neighbors and friends; and as such, should have the force and effect of a settlement made by the parties themselves. If there is a failure to comply with the agreement to submit, or with the terms of the award when rendered, the remedy would be by action either on the agreement or award, and such award could not, of course, like one under the code, be returned to court for judgment and execution. It may, however, be set up as a defense to an action brought or prosecuted for the subject-matter therein settled. In *King v. Hampton*, 4 G. Greene, 401, it appears that to an action to recover damages for the fraudulent sale of lands defendant pleaded in bar an arbitration and award. This was demurred to, for the reason that the arbitration was not conducted in strict conformity to the code; that the award, by the terms of the submission, was to be returned to a justice of the peace instead of the district court. The court, after disposing of other questions, add that they have no doubt but that the award was good, and could be enforced at common law, clearly indicating from the whole opinion that an award would be good as to the parties, though not rendered in the manner required by the code. And to the same effect, see *Carpenter v. Edwards*, 10 Met. 200; *Wells v. Lain*, 15 Wend. 99; *Ressequie v. Brownson*, 4 Barb. 541; *McMullen v. Mayo*, 8 Smed. & M. 298; *Norton v. Savage*, 10 Mo. 457; *Keep v. Goodrich*, 12 Johns.

397. We conclude, therefore, that the testimony was improperly rejected. The effect of it when introduced is another question. There is nothing apparent on the face of the proceedings that so far vitiates them as to justify their exclusion. It may be that the award was made without notice to the plaintiff; or the agreement to submit may have been fraudulently obtained; and that in various methods plaintiff may avoid the effect of such proceeding. But *prima facie*, the testimony offered was pertinent to the issue, and should have been received.

Judgment reversed.

INSTRUCTION, THOUGH CORRECT, SHOULD BE REFUSED, unless the evidence or pleadings show it to be pertinent, and there is a basis for it in the facts of the case: *State v. Gibbons*, 10 Iowa, 119, citing the principal case; see also *Johnson v. Jennings*, 60 Am. Dec. 323; *Duggins v. Watson*, Id. 560; *Baltimore & S. R. R. Co. v. Woodruff*, 59 Id. 72; *Marshall v. Haney*, Id. 92; *Cowles v. Bacon*, 56 Id. 371; *State v. Hildreth*, 51 Id. 369; *Henderson v. Western M. & F. I. Co.*, 43 Id. 176, and note 180, where other cases are collected.

IRRELEVANT INSTRUCTIONS SHOULD NOT BE GIVEN: *Pennington v. Yell*, 52 Am. Dec. 262; *Stout v. McAdams*, 33 Id. 441; *Hanse v. New Orleans Ins. Co.*, 29 Id. 456.

ARBITRATION AND AWARD.—As to the effect of a submission upon a pending action, see *Moore v. Allen*, 58 Am. Dec. 700, note 702; *Nettleton v. Gridley*, 56 Id. 378, note 381, where this subject is discussed at length. In *Collins v. Karatovsky*, 36 Ark. 328, it is said, citing the principal case, that if parties by their voluntary act submit their cause to another tribunal chosen by themselves, the jurisdiction of the court determines. As to when a submission invalid under the statute may be valid as a common-law submission, see *Winn v. Elderkin*, 52 Am. Dec. 159, note 161, where other cases are collected. In Iowa, an award cannot be treated as an award under the statute unless the parties comply with the provisions of the code: *Love v. Burns*, 35 Iowa, 153, citing the principal case. Failure to give notice vitiates the award: See *Emery v. Owings*, 48 Am. Dec. 580, note 586, where other cases are collected. As to the conclusiveness of the award, see *Stewart v. Cass*, 42 Id. 534, note 537, where other cases are collected; *Oakes v. Moore*, 41 Id. 379. The principal case is cited in *Fink v. Fink*, 8 Iowa, 316, to the point that an action may be maintained on an award of arbitrators, good at common law, the same as on any other agreement.

RAVER v. WEBSTER.

[3 Iowa, 502.]

IN ACTION ON ATTACHMENT BOND, RECORD AND PROCEEDINGS IN ORIGINAL CASE are competent evidence for the plaintiff.

WHERE PETITION CHARGES THAT PLAINTIFF IN ATTACHMENT ACTED WILLFULLY WRONG in suing out the writ, and seeks to recover exemplary damages, the true issue is whether or not such plaintiff, when he made

his affidavit for the writ, had, as a reasonable, prudent, and cautious man, good reason to believe, and did believe, what he stated therein as true. And evidence tending to show that he had reasonable grounds to believe what he stated in such affidavit is admissible.

WORD "WRONGFULLY," AS USED IN SECTION 1854, IOWA CODE, MEANS unjustly, injuriously, tortiously, in violation of law.

TO MAKE ACT OF CREDITOR, IN SUING OUT ATTACHMENT, WILLFULLY WRONG, and entitle the debtor to exemplary damages, it is not enough to show that the attachment was wrongfully sued out, but it must further appear that the creditor procured the attachment without any reasonable ground to believe the truth of the matters stated in the affidavit, and with the intention, design, or set purpose of injuring the debtor.

JUDGMENT FOR DEFENDANT IN ATTACHMENT SUIT IS SUFFICIENT EVIDENCE that there was, in fact, no ground for the institution of the suit; but it is not, in an action on the attachment bond, conclusive evidence that the plaintiff in the attachment acted willfully wrong in suing out the writ, and that he had no reasonable grounds to believe what he stated in his affidavit as true.

COURT IS NOT BOUND TO GIVE INSTRUCTION WHICH HAS BEEN ONCE GIVEN. IN ACTION NOT FOUNDED ON CONTRACT, PLAINTIFF IS NOT ENTITLED TO ATTACHMENT on the ground that the defendant has property, goods, money, lands, and tenements, or choses in action, not exempt from execution, which he refuses to give either in payment or security of the debt.

ACTION on attachment bond. The petition alleged that the attachment was sued out willfully wrong, and claimed exemplary damages. In the affidavit of Webster for the attachment against Raver, it was alleged "that said Raver had money, goods and chattels, lands and tenements, which are not exempt from execution, which he refuses to apply to the payment or security of said damages, though requested so to do by your petitioner." The other facts appear from the opinion.

Smith, McKinlay, and Poor, and W. J. Henry, for the appellants.

H. O'Connor, for the appellee.

By Court, WRIGHT, C. J. The first assignment is, that the court erred in admitting the record and proceedings in the original case, in evidence against the sureties in the attachment bond. There can be no question as to the admissibility of this evidence. Of its competency, there can be no doubt. Among other matters contained in this record was the bond on which the suit was brought, as also the affidavit and judgment. Was it not material for plaintiff to show these matters? Indeed, without the record in the original case, how could any plaintiff ever sustain an action upon an attachment bond? It seems to us to be the most pertinent and necessary evidence that a party

could introduce in such cases. Its conclusiveness raises another question, which is made by the second assignment of error, which we next proceed to notice.

In the attachment suit, Webster sought to recover damages for the alleged wrongful and fraudulent act of Raver, in breaking open a letter intrusted to his care by Webster, which contained instructions from him to his agents in relation to the entry of certain lands. On the trial of this case, as shown by the bill of exceptions, the defendants introduced a witness by whom they proposed to prove that said Raver had stated to him that he had opened the letter, as alleged in the petition of Webster, which testimony was objected to by plaintiff, and the objection sustained.

To determine this question, it becomes necessary to first ascertain what is the true issue in this class of cases. Is it that the defendant in the attachment was not in fact indebted to the plaintiff in the manner charged? Or, to take a case of more frequent occurrence in practice, is the issue whether the defendant, at the time of making the affidavit, was in fact a non-resident of the state; or, in fact, about to dispose of his property with intent to defraud his creditors; or, in fact, about to do, or refuse to do, any one of the things which entitle the creditor to an attachment? Or, on the other hand, is the true issue whether the affiant, as a reasonable, prudent, and cautious man, had good reason to believe, and did believe, what he stated as true?

And notwithstanding the rejection of this testimony would seem to indicate that the court below regarded the issue first stated to be the true one, yet the instructions given would tend to show that the latter was the one submitted to the jury, for we find the following instructions asked by defendants and given by the court:

"12. That the petition in an attachment cause, and verdict and judgment therein, are not in themselves, in all cases, sufficient evidence that the attachment was willfully wrong.

"13. That it cannot be presumed against Webster, that he willfully swore to an untruth; that the verdict and judgment against him in the other case are not of themselves evidence that the petition in that case was untrue, but merely that Webster failed to prove it before the jury; or that if true, they considered it no cause of action.

"14. That the verdict and judgment in the other case are not of themselves sufficient to rebut the presumption that Web-

ster made affidavit to the petition in good faith, and with full belief that the allegations therein made were true."

Now, we think it quite manifest that if these instructions are correct (and especially those numbered 13 and 14), then the testimony offered should have been received. For to say that the former verdict and judgment were not in themselves evidence that the petition therein was untrue, and that they were not of themselves sufficient to rebut the presumption that he made the affidavit in good faith, and with the full belief that its allegations were true, would seem to recognize either the necessity for further proof on the part of the plaintiff to sustain his action, or that defendants might be allowed to show, notwithstanding said verdict and judgment, that the affidavit was made in good faith. And in either event, the testimony offered would seem to be pertinent. For certainly, if the question of good faith was subject to inquiry after the judgment in the original action, the testimony as to what Raver said in relation to the breaking open the letter as charged in the original petition, if brought home to Webster before making the affidavit, would be quite material for the consideration of the jury. But if, on the other hand, the true inquiry in such cases is whether the affidavit is true in fact, or in this case whether Raver was in fact liable in damages for the matters stated in the original petition, then it seems to us that the judgment would conclude the parties on that issue, and further, that these instructions were incorrect, and this testimony inadmissible. Which, then, is the true issue?

Without now determining what would be the rule where damages are claimed for the wrongful issuance of the attachment, we incline to the opinion, and so hold, that in the case before us, where the petition charges that the plaintiff in the attachment acted willfully wrong, and seeks to recover exemplary damages, the true issue is that made and presented by the instructions, and that the testimony offered was therefore improperly rejected. Our law provides that the plaintiff in attachment shall give bond, conditioned that he will pay all damages which the plaintiff may sustain by reason of the wrongful suing out of the attachment. In an action on such bond, the plaintiff therein may recover, if he shows that the attachment was wrongfully sued out, and if willfully wrong, he may recover exemplary damages; nor need he wait until the principal suit is determined before he brings suit on the bond: Code, sec. 1854. By "wrongfully," as here used, we understand is meant unjustly, injuriously, tortiously, in violation of right. To make the act of the creditor willfully

wrong, and entitle the debtor to exemplary damages, something more is necessary. It must appear that he procured the attachment without any reasonable ground to believe the truth of the matters stated in the affidavit, and with the intention, design, or set purpose of injuring the defendant. And therefore, the inquiry where exemplary damages are claimed is, Did the plaintiff act willfully, or with the design and intention of injuring the defendant? And as a consequence of this, though he may fail in his action, he is not, therefore, precluded from showing in an action brought on the attachment bond that he acted in good faith, and at the time he made the affidavit he had good reason to believe that he had a just and valid claim against the defendant. The judgment against him, it is true, was a judicial determination of the matters then in litigation, and the correctness of that finding could not again be drawn into controversy. It may therefore be admitted that by the judgment it was authoritatively determined that plaintiff had no such claim against defendant as was set up in his petition. And yet it would not follow as a consequence that he had not good reason to believe that he had, or that he might not in good faith, and with no intention or design to injure defendant, have made the affidavit, and procured the attachment. The issues, we think, are quite distinct.

Let us, by a brief reference to what we understand to be some of the circumstances of this case, further illustrate our position. As before stated, Webster charged Raver with having broken open a letter, and thereby to have obtained information which induced Raver to proceed at once to enter the parcel of land, which by the letter Webster had instructed his agents to enter for him, whereby he, Webster, was injured, etc. From the instructions in the case, it also seems that before obtaining his attachment, Webster consulted an attorney, and probably acted under his advice and direction. Now, the very character of the charge was such as to make the proof of it, in most instances, quite and even extremely difficult. This fact should, perhaps, have counseled care on the part of the affiant before making so serious a charge against defendant. And yet the circumstances within his knowledge, after the most careful inquiry, may have been such as to produce the clearest conviction on his mind of defendant's guilt. Other circumstances may have developed themselves subsequently; the defendant may have shown many facts in his defense, all of which, when known and proved, may have satisfied the plaintiff, as they did the jury, that there was no just foundation for the charge. But to make the finding of

the jury as to the fact of the indebtedness, or as to the truth or falsity of the charge made in an action for a tort, conclusive evidence of the intention of the affiant to injure the defendant is, in our opinion, to disregard the consideration of those circumstances upon which he acted, and to leave out of view entirely the motive by which he was in fact governed. Suppose a number of persons, of whose veracity he had no reason to doubt, had told him before making this affidavit that Raver had, in their presence, broken open this letter; or that he had told them that he had broken it open; and before the trial of the original action they had died, or for some cause their testimony could not be obtained, or when called onto the stand in that trial they had denied all knowledge of anything of the kind: would it do to say that because plaintiff, under such circumstances, had failed in his action, he could not, when sued on the bond, in order to show the good faith with which he acted, prove by other persons that these witnesses had stated to him these facts? We think most clearly not. And thus we might, in various ways, illustrate the impropriety of making the judgment conclusive, but these must suffice.

The judgment may be sufficient evidence that there was in fact no ground for the institution of the suit, but to make it conclusive that the plaintiff had no reasonable grounds to believe what he stated, and acted willfully wrong, we think is giving it too much effect. As the testimony offered, therefore, had a tendency to show that he had reasonable grounds for believing what he stated in his affidavit, it was admissible. We say it had a tendency to prove this. Of course it must be shown that it was known to the affiant at the time of making the affidavit. If not known to him, he could not have acted upon it. No objection of this kind was made to its introduction, however, and it was the right of the defendants to first prove the fact, and bring it home, if they could, to the affiant. If they fail in thus bringing it to his knowledge, it should of course be rejected.

The disposition of this question must reverse the case. Several other errors are assigned, however, which we will briefly notice, as they may arise in a subsequent trial.

It is claimed that the sureties, by the terms of the bond, are not liable for the damages sustained after the making of it, but only for those sustained before that time. To this we answer, that no such point was directly made or determined by the court below. That court was not called upon to give a construction to the bond itself. At least, no construction was given adverse

to that urged by appellants. On the contrary, the instructions on this point, as far as they go, are quite as favorable to them as they can reasonably ask. They have certainly no reason to complain.

It is next objected that an instruction numbered 4 was improperly refused. We think that another instruction asked by defendants, and given, covers substantially and sufficiently the same ground, and there was therefore no error in refusing the fourth. A court is not bound to give the same instruction as often as it may be asked, but has a discretion to refuse it, after it has been once clearly given. And it would be well, in our opinion, if this discretion was more fully exercised.

During the progress of the trial, the court, at the request of the plaintiff, instructed the jury that "the advice of counsel will go to rebut the idea of malice, but the defendant must prove that he submitted his case to an attorney, and that on the case submitted, he was advised by said attorney that he had a good cause of action, and a right to sue out an attachment. It is for him to make out this defense, and he must prove it. When proved, it will save him from exemplary, but not from actual, damages." The defendant then asked the court to instruct the jury "that if the jury are satisfied that the defendant Webster was advised by counsel practicing in this court that the facts set forth in his petition did constitute a legal cause of action, it will be a sufficient justification for bringing the suit, notwithstanding the attorney may have erred in giving such advice," which instruction the court refused to give. In regard to these instructions, we need only say that we think the instruction given, as asked by plaintiff, is substantially correct, or at least, we see nothing in the circumstances of the case which would lead us to believe it to be incorrect. The one asked by defendant goes too far. The fact as there stated might, if proved, be a circumstance to be weighed by the jury in assessing damages, but the instruction assumes that it would be a sufficient justification for bringing the original suit. Without some further qualifications, the instruction was properly refused.

Another point made, and one of no little practical importance, is, whether, for the cause set forth in the affidavit, a party is or is not entitled to an attachment in an action not founded on contract.

The code, sec. 1846, provides that in an action for the recovery of money the plaintiff may cause any property of the defend-

ant, which is not exempt from execution, to be attached on the commencement or during the progress of the proceedings, by pursuing the course hereinafter presented. Section 1848 provides that "the petition which asks an attachment must in all cases be sworn to. It must state that, as affiant verily believes, the defendant is a foreign corporation, or acting as such; or that he is a non-resident of the state; or that he is in some manner about to dispose of or remove his property out of the state, without leaving sufficient remaining for the payment of his debts; or that he has disposed of his property (in whole or in part) with intent to defraud his creditors; or that he has absconded, so that the ordinary process cannot be served upon him." And then, by sections 1849, 1850, and 1851, it is provided that if the demand is founded on contract, the petition must state that something is due, and as nearly as practicable the exact amount, which amount is intended as a guide to the sheriff in making his levy, who is to attach property fifty per cent greater in value than the amount thus stated. If the demand is not founded on contract, the petition must be presented to some judge of the supreme, district, or county court, who is to make an allowance thereon of the amount in value of the property to be attached; but this provision applies only to cases in the district court.

In 1853 section 1848 was amended as follows: "That in addition to the causes for which an attachment may issue, as prescribed in said section, said writ shall be authorized upon the plaintiff's statement in his petition, sworn to as therein required, that the defendant is about to abscond, to the injury of his creditors, or that he has property, goods, or money, or lands and tenements, or choses in action, not exempt from execution, which he refuses to give either in payment or security of said debt:" Laws 1853, c. 84, 143.

In this case, the court instructed the jury that the affidavit set forth no sufficient cause for an attachment, for the reason that the provisions of this amendatory law applied alone to actions founded on contract. And while the question is not entirely free from doubt, yet we think the spirit, if not the strict letter, of the law favors this ruling.

To allow an attachment under any circumstances in actions for torts is not allowed in many of the states; and never, unless under some other restrictions than those provided in actions on contracts; and hence, under our code, in such actions some of the officers named must make an allowance of the amount of

property to be attached, whereas, in actions on contract, the filing of the affidavit and bond procures the writ. And while we are not inclined to give so strict a construction to any part of the attachment law as will limit or restrain its full and legitimate operation, we are not disposed to extend its provisions in actions for torts beyond what may clearly seem to be its intention and purpose. And therefore, we would not recognize the right to an attachment in such cases, unless such was evidently the intention of the legislature. And in consonance with this, is the first argument we would present in favor of the ruling of the court below. To allow an attachment in actions on contract, even for the causes set forth in this affidavit, is an innovation upon the law as it had stood from the organization of even our territorial government. This fact alone should lead us to limit its operation to that class of cases, unless the other is also fairly included in its provisions. Again, this amendatory act, we think, contemplates that the claim sued on shall be liquidated or ascertained, or one which is susceptible of being rendered certain without the judgment of a court. It contemplates the right of the creditor to demand payment or security for his debt, and a refusal on the part of the debtor to either pay or secure the debt as requested. And while we would not lay too great stress on the word "debt" as here used, yet we are not at liberty to entirely disregard it. We cannot suppose that the legislature used the word in any other sense than that ordinarily and appropriately attached to it. And thus construed, we understand it to mean to owe, or that which is contracted—from *debeo*, to owe; *debitum*, contracted—that which is due or owing from one person to another; that for which a person is held, or which he is bound to pay. Now, if one man assaults and beats another, if one shall slander his neighbor, or commit any other act amounting to a tort or wrong, while he may be answerable in damages, yet we never speak of the amount to which the injured party may be entitled as a debt; it is not set down by the business man ordinarily among his assets or liabilities, nor in any way do we regard it in the nature of a sum owing or due, as by contract.

But without pursuing this thought further, we turn our attention more particularly to the other language of the law. To give a party the right to demand payment or security for the claim he may hold against another presupposes almost necessarily that his claim or demand is either in fact ascertained and settled, or that it may be approximated, at least, by fixing a value on those things, or those services, which in every commu-

nity have some estimated or marketable worth. Else on what basis would he proceed in demanding payment or security? Or if payment or security should be offered, for what amount? By whom, or how, is the amount to be ascertained? If the defendant is willing to comply, where is the *data* from which the computation is to be made? It will be readily seen that all these and many other difficulties would arise on the application of this law to actions for torts. The defendant must refuse to give his money or property in payment or security for the debt. There is something for him to do, or refuse to do, before he is liable to this process. And why shall he be liable for refusing to do that which in many cases would be almost, if not quite, impossible, from the fact that neither party can tell what the debt or demand really is. A breaks B's arm or leg, or, as a surgeon, he treats some fracture in so unskillful a manner that B is deprived of the use of his limb; or he accuses him of a crime, and is liable in an action of slander. B thereupon says to him: "I demand that you pay or secure me for the damages I have sustained by your wrongful act;" to which A responds, either that he does not owe him anything, or that he is ready to comply. Has B the *data*, within the meaning of this law, from which they can proceed to estimate the amount to be paid or secured? Or if he has, according to his appreciation of the injuries received at the hands of A, is it probable that A will agree with him? If experience in such cases prove anything, it is that parties would very seldom, if ever, agree on the amount. The consequence is, that you make the defendant liable to an attachment when he may be guilty of no wrong; when he is willing to do what he conceives to be his honest duty; and when it is the plaintiff, perhaps, smarting under his real or imagined injuries, who overestimates what is due from the defendant. Now, we suppose that this law was intended primarily to meet a class of cases of the following character: The creditor has a known and undisputed debt against his debtor. It is due and should be paid. His debtor has money or property with which he can, if so disposed, either pay or secure this debt; he is appealed to for this purpose, and refuses. The law then says, in effect, This debt you are able to and ought to pay, or at least secure; you refuse to do either; and your creditor, upon making affidavit to that effect, may secure himself by attachment. We say we think this was the primary intention of the law. In its application it may, and we think does, include those cases of contract where there may be dispute as to the amount due.

And so there may be cases in tort where the amount to be paid could be ascertained with perhaps less difficulty than others founded on contract. But such would be exceptions; the rule is certainly the other way. And while there may be difficulties in applying the law to all actions founded on contract, which would not arise in some actions for torts, we nevertheless think that, as a rule, it was intended to apply to the one, and not the other.

We conclude, therefore, that this instruction was properly given. How far the fact that such an affidavit did not entitle the party to his attachment may affect his liability on the bond, is a question not now before us, and upon it we intimate no opinion.

Because there was error in excluding the testimony offered by defendants, the judgment is reversed, and cause remanded.

ACTION FOR MALICIOUSLY SUING OUT ATTACHMENT: See *Forrest v. Collier*, 56 Am. Dec. 190, note 193; *Donnell v. Jones*, 48 Id. 59; *Abbott v. Kimball*, 47 Id. 708; *Williams v. Hunter*, 14 Id. 597, note 600, where this subject is discussed. A defendant in attachment who is injured by the issuance of the writ is not compelled to wait until the principal suit is determined before he can sue on the bond: *Campbell v. Chamberlain*, 10 Iowa, 339, citing the principal case. The judgment in the attachment suit conclusively determines the question of indebtedness between the parties, but it does not determine the question whether the plaintiff might not have had reasonable grounds to believe the truth of the matters stated in the petition and affidavit for the writ: *Gaddis v. Lord*, Id. 144, citing the principal case. In *Burton v. Knapp*, 14 Id. 198, the court say that the principal case recognizes, indirectly at least, that in an action on an attachment bond the question under the Iowa statute is, not whether the facts were actually true upon which the attaching plaintiff based his affidavit for the writ, but had he, exercising that degree of caution that a reasonable, prudent man should, good cause to believe that which he stated as true. In an action on an attachment bond, the writ and the officer's return thereon are admissible in evidence: *Drummond v. Stewart*, 8 Id. 344, citing the principal case.

COURT IS NOT BOUND TO REPEAT INSTRUCTION which it has already given in substance: *Russ v. Steamboat War Eagle*, 14 Iowa, 370, citing the principal case; *Taber v. Hutson*, 61 Am. Dec. 96, note 101, where other cases are collected.

THE PRINCIPAL CASE IS CITED in *Lord v. Gaddis*, 6 Iowa, 60, to the point that an action on a penal bond for the recovery of damages is an action founded on a contract; in *Town of Decorah v. Dunston*, 34 Id. 361, that it is only in actions *ex delicto* that the petition for the attachment must be presented to the judge for allowance of the amount in value of the property that may be attached; in *Warner v. Cammack*, 37 Id. 644, that where the action is in tort, and sounds only in damages, the obligation to pay is not a debt until it is ascertained by judgment; and in *Cramer v. White*, 29 Id. 338, that a petition must show something to be due over five dollars to authorize an attachment. It is distinguished in *Drummond v. Stewart*, 8 Id. 344.

FOLEY v. McKEEGAN.

[4 IOWA, 1.]

OBJECTION TO DECISION ON DEMURRER MUST BE TAKEN AT TIME, and it is too late, on appeal, after amendment of the petition and trial on the merits, to take such objection for the first time.

WHETHER SUM PROVIDED IN CONTRACT TO BE PAID ON NON-PERFORMANCE shall be considered as a penalty or as liquidated damages, is a question of construction, on which the court may be aided by circumstances extraneous to the writing.

IN CONSTRUING CONTRACTS, SUBJECT-MATTER AND INTENTION OF PARTIES, as well as other facts and circumstances, may be inquired into, though the words are to be taken as proved exclusively by the writing.

COURTS IN CONSTRUING CONTRACTS TO DETERMINE WHETHER SUM FIXED CONSTITUTES PENALTY OR LIQUIDATED DAMAGES must see whether the agreement contains one or several stipulations; whether such stipulations vary in importance; whether the damages are in their nature certain or uncertain, or difficult of definite ascertainment; or whether, where the injury is certain, the sum fixed upon is proportionable or disproportionate to such injury and the actual claim which grows out of it.

TERMS APPLIED BY PARTIES TO SUM FIXED ON, TO BE PAID ON NON-PERFORMANCE of contract, will not always determine the action of the court in construing the effect of such a provision in a contract; and though the parties call the sum so fixed a "penalty," or give it no name, or style it "liquidated damages," the court, in any and all such cases, will treat the sum as one or the other, depending on the nature of the agreement, intention of the parties, surrounding circumstances, and reason and justice of the case.

STIPULATION FOR PAYMENT OF SPECIFIED SUM ON NON-PERFORMANCE OF CONTRACT will generally be treated as a penalty, rather than as liquidated damages, if the intention of the parties as to the effect of such stipulation appears doubtful.

STIPULATIONS IN CONTRACT FOR SALE OF LAND, that if the purchaser fail to pay the balance of the purchase money he shall forfeit the fifty dollars which he has already paid, or if the vendor shall fail to properly execute deeds to the vendee when the purchase money is paid he shall forfeit the sum of fifty dollars, are construed as creating penalties, and not as fixing the amount of damages.

CONTRACT FOR PERFORMANCE OF SEVERAL ACTS, AND FOR PAYMENT OF SPECIFIED SUM on breach of the agreement, must be construed as creating a penalty.

MEASURE OF DAMAGES FOR BREACH OF COVENANTS IN CONTRACT which contains a stipulation for the payment of a specified sum on breach of the covenants, such sum being construed to be in the nature of a penalty, may be more or less than the amount of such penalty.

MEASURE OF DAMAGES AGAINST VENDOR OF REALTY FOR FAILURE TO CONVEY depends on the cause of the failure to convey: if the vendor was honest, but was prevented, by unforeseen causes beyond his control, from making the conveyance, the plaintiff should recover only nominal damages, or where the vendee has already paid the purchase price, he should

recover the sum paid, with interest; but if the vendor is in fault, and should have known that he could not comply with his contract, or having title refuses to convey or disables himself from so doing by sale to a third person, or if he had no title at the time of agreement, or in any other case where the inability to convey might arise from fraud in the covenantor, the purchaser should recover substantial damages, including compensation for actual loss, and for the increase of value of the land.

BILL for specific performance of the following agreement, viz.: "I, John McKeegan, have this day agreed and sold two hundred acres of land, more or less [describing it], for which I am to receive eight hundred and eighty dollars, fifty dollars of which I am now to receive, and the same is to be forfeited by Michael Foley if he does not pay the balance on or before the tenth day of April, 1854; and then I will give the deeds of the aforesaid places at the time the money is paid. I, the said John McKeegan, promise to give the said Michael Foley next April, together with the land, the following property [mentioning several items of personal property], and to put five hundred rails on the fence of the field. I also bind myself, under the penalty of fifty dollars, to be paid to Michael Foley, if I fail in the fulfillment of the aforesaid agreement, and to the aforesaid we both sign our hands." (Signatures.) In such bill plaintiff prayed that in case he should be declared not entitled to a specific performance, that he recover damages. A demurrer to this bill was sustained, and plaintiff amended so as to make the proceeding a simple action at law to recover damages for breach of the above contract. Plaintiff alleged tender on his part of the balance of the purchase money due, which tender was admitted. On the trial, the court charged the jury that by the terms of the agreement plaintiff was entitled to recover one hundred and five dollars, being the fifty dollars paid by plaintiff, and interest, together with the fifty dollars fixed as penalty in the bond or agreement. The verdict was for plaintiff for one hundred and five dollars, and judgment was entered thereon. Plaintiff appealed. The further facts are stated in the opinion.

Smith, McKinlay, and Poor, for the appellant.

Ben M. Samuels, for the appellee.

By Court, WRIGHT, C. J. Several errors are assigned, but they may all appropriately be considered under two heads: 1. Did the court err in sustaining the demurrer to the original petition? 2. Was the construction given to the written agreement, as to the measure of plaintiff's damages, or the amount he had a right to recover, correct?

As to the first, we think plaintiff cannot now complain. Instead of standing by his original bill, he appears to have voluntarily abandoned it, submitted to the decision of the court on the demurrer, made his amendment, and went to trial on his claim for damages. By so doing, he has changed the whole form of his action, and it is now too late for him to claim a specific performance of the agreement. The defendant also claims that plaintiff had no right to so amend his petition, and that in permitting the same the court erred. To this a sufficient answer is that defendant at the time made no objection, but took issue upon such amended petition, and went to trial upon the merits. It is now too late for him to object.

The second question is one of more difficulty. There can be no doubt, from the state of the pleadings, that plaintiff was estopped from denying the value of the property at the time of the tender. And this because the value is distinctly averred in the petition, not denied in the answer, and is therefore admitted under our practice. But this can make no difference, if the construction given to the within agreement by the court below is correct.

For if plaintiff can only recover the money paid, and the penalty named in the bond, then the value of the land and personal property, whether established by the pleadings or by the testimony of witnesses, becomes entirely immaterial. So that the sole question arises on the instruction given to the jury as to the amount of plaintiff's recovery.

There is much uncertainty in the application of the cases on this subject, and not by any means an entire uniformity in the principles which have influenced the mass of decisions thereon. From all, however, we may deduce one point as settled. Whether the sum mentioned shall be considered as a penalty or as liquidated damages is a question of construction on which the court may be aided by circumstances extraneous to the writing. The subject-matter of the contract, the intention of the parties, as well as other facts and circumstances, may be inquired into, although the words are to be taken as proved exclusively by the writing: *Perkins v. Lyman*, 11 Mass. 76; 2 Parsons on Contracts, 439; *Saintier v. Ferguson*, 7 C. B. 716; *Brewster v. Edgerly*, 13 N. H. 275. In giving a construction, also, we must see whether the agreement contains one or several stipulations; whether such stipulations vary in importance; whether the damages are in their nature certain or uncertain, or difficult of definite ascertainment: or whether, where the injury is certain, the sum

fixed upon is proportionable or disproportionate to such injury and the actual claim which grows out of it: 2 Parsons on Contracts, 435; *Dennis v. Cummins*, 3 Johns. Cas. 297 [2 Am. Dec. 160]; *Asley v. Weldon*, 2 Bos. & Pul. 346; 1 Phill. Ev., 7th ed., 167; *Kemble v. Farrel*, 6 Bing. 148; *Price v. Green*, 16 Mee. & W. 346; *Heard v. Bowers*, 23 Pick. 455. The terms applied by the parties to the sum fixed upon will not always define and determine the action of the court in giving such construction; that is to say, though the parties may call the sum so fixed a "penalty," or give it no name, or style it "liquidated damages," the court in any and all such cases treat the sum as one or the other, depending upon the nature of the agreement, the surrounding circumstances, the intention of the parties, and the reason and justice of the case: 2 Parsons on Contracts, 438; *Harbrouck v. Lappen*, 15 Johns. 200; *Chamberlain v. Bagley*, 11 N. H. 234; *Dakin v. Williams*, 17 Wend. 447; *Carpenter v. Lockhart*, 1 Ind. 434; *Beale v. Hayes*, 5 Sandf. 640; *Linsley v. Anesley*, 6 Ired. L. 186.

Another rule, fairly deducible from the authorities, is that if by the agreement it is doubtful whether the parties intended that the sum specified should be a penalty or liquidated damages, courts incline to treat the contract as creating a penalty to cover the damages actually sustained by the breach, and not as liquidated damages: *Taylor v. Sandiford*, 7 Wheat. 13; *Shute v. Taylor*, 5 Met. 61; *Bagley v. Peddie*, 5 Sandf. 192; *Baird v. Toliver*, 6 Humph. 186. And in the case of *Taylor v. Sandiford*, *supra*, it is held that the inference is much stronger in favor of its being a penalty when it is expressly so reserved, and that it would require in such a case strong evidence to authorize the court to say that the parties have not by their own words expressed their own intention: See also *Hamilton v. Overton*, 6 Blackf. 206 [38 Am. Dec. 136].

A brief reference to one or two adjudicated cases, and we will then proceed to construe the instrument before us.

In *Davies v. Penton*, 6 Barn. & Cress. 216, A agreed to sell to B the stock and good-will of his business, and to demise to him his house in which the business was carried on, for which B was to pay eight hundred pounds, and to take the furniture and fixtures at a valuation, which were afterwards valued at one hundred and seventy-four pounds. At the time of executing the agreement, four hundred pounds was paid to A, and B agreed to accept and pay two bills of exchange, one for four hundred pounds, payable twelve months from date, and the

other for one hundred and seventy-four pounds, payable two months from date. And A agreed not to carry on the business within five miles of the house; and for the true performance of this agreement each of them did thereby bind and obligate himself to the other, in the penal sum of five hundred pounds, to be recovered for a breach of the said agreement in a court of law, as and by way of liquidated damages. Held by Abbott, C. J., and Bayley, Holroyd, and Littledale, justices, that the sum was a penalty, and not liquidated damages. In *Lowe v. Peers*, 4 Burr. 2227, the distinction between liquidated damages and a penalty to secure the performance of a contract is expressed by Lord Mansfield. Says his lordship, there is a difference between covenants in general and covenants secured by a penalty or forfeiture. In the latter case, the obligee has his election to bring an action for the penalty, after which he cannot resort to the covenant, or to proceed upon the covenant and recover more or less than the penalty: See also *Harrison v. Wright*, 13 East, 343.

In *Martin v. Taylor*, 1 Wash. 1, the action was covenant upon an agreement under seal. By the agreement, the parties, for the true and faithful performance of all the covenants therein contained, bound themselves each to the other in the penalty of one hundred and twenty pounds, Virginia currency. It was objected that the one hundred and twenty pounds was in lieu of liquidated damages, and that as the plaintiff could recover no greater sum than that, the court had no jurisdiction of the case, that court having no jurisdiction where the demand was for less than five hundred dollars. The objection was overruled, however, and held that the action being in covenant, and not for the penalty, the plaintiff might recover more or less than the penalty.

In *Carpenter v. Lockhart*, 1 Ind. 434, the action was covenant on an agreement containing a number of stipulations, damages for the breach of some of which would be certain, and of others uncertain, and contained a mutual covenant that if either should fail "in any particular to abide by, observe, and perform the above-written agreement, or any article, clause, covenant, or promise therein contained, by and on his or their part to be observed, kept, etc., the party so failing shall pay the other party ten thousand dollars, and no greater or smaller sums, as and for the damages occasioned by such failure." This sum was regarded as a penalty, and not as liquidated damages.

In view of the above general doctrines, and such as are de-

ducible from the cases cited, we are of the opinion that the sum inserted in this contract to be paid on its non-fulfillment was designed by the parties as a penalty, and not as liquidated damages. In the first place, the parties have so expressly denominated it; and while the construction is not to be conclusively determined by their having so styled it, yet in the language of Chief Justice Marshall, in *Taylor v. Sandiford*, 7 Wheat. 13, "the inference is much stronger in favor of its being a penalty where it is expressly reserved as one." In the next place, this agreement contains more than one stipulation, or the defendant binds himself to do more than one act. And these stipulations differ materially in their importance. He binds himself to make a deed to two parcels of land, or "places," as they are called in the agreement. He also undertakes to put on the fence of the field five hundred rails, and to deliver to plaintiff various articles of personal property. Suppose he performed his agreement as to the land, and delivered all the personal property except the five bushels of potatoes or the two pigs therein named, it would be manifestly unjust and oppressive to require him to pay the fifty dollars named.

And on the other hand, suppose he had performed the unimportant parts of the agreement, and failed to convey the land, is the measure of the plaintiff's damages the same? The answer must readily be, that in the one instance it would be too high, and in the other it might be too low. But again, if he fails entirely to perform either of his covenants or stipulations, the reason is still stronger why the damages should be different than if he failed in an unimportant or any one important particular. On this subject, see *Astley v. Weldon*, 2 Bos. & Pul. 346. It is there stated that where articles contain covenants for the performance of several things, and where one large sum is stated at the end to be paid, upon the breach of performance, that must be considered as a penalty. So in *Davies v. Penton*, 6 Barn. & Cress. 216, above cited, says Bayley, J., where the sum which is to be the security for the performance of an agreement to do several acts will, in case of breaches of the agreement, be in some instances too large and in others too small for the injury thereby occasioned, that sum is to be considered a penalty: See also *Jackson v. Baker*, 2 Edw. Ch. 471. And again, the damages to arise from a breach of some of the stipulations of this contract, if not all, are not uncertain, but may be ascertained by evidence. The consideration for the defendant's undertaking is disclosed, and the motives that influenced the contract. And in this and other

particulars this case differs from that of *Hamilton v. Overton*, 6 Blackf. 206. In that case there was but one covenant, and from its nature, the damages for a violation of it were entirely uncertain, and could not be ascertained by evidence. It also appeared that the parties had expressly stipulated that the sum named should be "liquidated damages," and it was so regarded. As to the rule on this subject, see 2 Parsons on Contracts, 435; *Kemble v. Farrer*, 6 Bing. 148; *Beale v. Hayes*, 5 Sandf. 640. We conclude, therefore, that the sum named in this agreement is not the measure of the plaintiff's damages, but must be treated as a penalty.

The plaintiff has elected to proceed upon the covenants, and not to recover the penalty, and such recovery, under the authorities cited above, may be more or less than the penalty. And further on this subject, see *Brown v. Bellows*, 4 Pick. 178; 2 Greenl. Ev., sec. 257. And this brings us to consider the rule of damages in such cases. It will be observed that this case is distinguishable from that class of cases that discuss the measure of damages in covenants of warranty and in covenants of seisin. In such cases the authorities are uniform as to the true measure in covenants of seisin, but not where the action is upon the covenants of warranty. In the latter case, in Massachusetts, Connecticut, Maine, Vermont, and South Carolina, and perhaps some other states, the measure is the value of the land at the time of eviction. In New York, Kentucky, Pennsylvania, New Jersey, Ohio, Georgia, North Carolina, Tennessee, and Virginia, the measure is the purchase money, with interest. In the former case we believe it to be uniformly held that the measure of damages is the purchase money and interest: *Marston v. Hobbs*, 2 Mass. 433 [3 Am. Dec. 61]; *Bickford v. Paige*, Id. 455; *Gore v. Bragier*, 3 Id. 543 [3 Am. Dec. 182]; *Cushman v. Blanchard*, 2 Greenl. 266 [11 Am. Dec. 76]; *Stirling v. Peet*, 14 Conn. 245; *Park v. Bates*, 12 Vt. 387 [36 Am. Dec. 347]; *Werthing v. Nissley*, 13 Pa. St. 650; *Clark v. Parr*, 14 Ohio, 118 [45 Am. Dec. 129]; *Bennet v. Jenkins*, 13 Johns. 50; *Holmes v. Sinnickson*, 15 N. J. L. 313; *Pence v. Duvall*, 9 B. Mon. 48; *Shaw v. Wilkins*, 8 Humph. 647 [49 Am. Dec. 692]. When the action is brought, as in this case, on a contract to sell, against the vendor, who has failed to convey, we find much difficulty in determining the measure of damages upon authority. As damages are given as a compensation or satisfaction to the plaintiff for an injury received from the defendant, reason and exact justice would seem to dictate that he should not in all such cases be

confined to the consideration money and interest, for frequently the interest upon the money paid is but the smallest fraction of the amount of injury actually sustained. On the other hand, quite as much injustice may result by holding that in all cases the plaintiff is entitled to the appreciated value of the land at the time the conveyance should have been made. May a rule be recognized, then, which shall have for its basis the giving of compensation for the injury, and at the same time avoid injury to a vendor, who acts in good faith? We believe there is such a rule sustained by authority and reason, and which, while it may not in all cases make the plaintiff whole, or give him full satisfaction, will approximate it, and be as just and equitable as is consistent with most general rules. We believe that the measure of damages should depend upon the cause of the failure. If the person selling is honest, and prevented from making the conveyance by unforeseen causes, and which he could not control, the plaintiff should recover only nominal damages. If he has paid the price, or any part thereof, then of course, in such a case, he should recover that sum with interest.

But if the person selling is in fault, and either did or should have known that he could not comply with his undertaking; or having the title, refuses to convey; or having title at the time of the agreement, afterwards disables himself from completing it, by a sale to a third person; or at the time of the agreement knew he had no title—in these and in all cases where the inability arises from fraud in the covenantor, the purchaser should recover substantial damages, “including compensation for any actual loss, as by the increased value of the land at the time the contract should have been executed.” And without referring to the authorities in detail, to sustain this view, we cite the following: *Hopkins v. Lee*, 6 Wheat. 109; *Nichols v. Freeman*, 11 Ired. L. 99; *Bryant v. Hambrich*, 9 Ga. 133; *Whitenside v. Jennings*, 19 Ala. 784; *Hill v. Hobart*, 16 Me. 164; *Warren v. Wheeler*, 21 Id. 484; *Buckmaster v. Grundy*, 1 Scam. 310; *McKee v. Brandon*, 2 Id. 339; *Cannell v. McClean*, 6 Har. & J. 297; *Hopkins v. Gaybrook*, 13 Eng. Com. L. 100; *Driggs v. Dwight*, 17 Wend. 71 [31 Am. Dec. 283]; *Peters v. McKeon*, 4 Denio, 546. And also see *Fletcher v. Button*, 6 Barb. 646. In this last case the question did not arise, but it is fairly intimated that plaintiff would not, in all actions brought on a covenant to convey, be confined to the purchase money paid, and interest. And we may also remark that many of the above cases hold that the measure of damages will not be influenced by the question of fraud in the

covenantor, but the same rule applies to bargains respecting lands as in those in actions for the non-delivery of chattels. Others, again, do admit the distinction. It is recognized by Mr. Parsons, in his late work on contracts, vol. 2, p. 505. And we believe it to be eminently just and proper.

That there are authorities holding a contrary view, we are well aware. But on the contrary, where land is so much an article of trade in the market, where its value so rapidly appreciates, where our citizens are constantly investing their means therein for purposes of legitimate profit and speculation, we see no reason why they should not have the expected benefit of their investments, where the covenantor, by his own wrongful act, deprives the purchaser of the land. The obligor binds himself to convey the land. Equity from the time of the agreement regards the land as belonging to the purchaser, and the money as belonging to the vendor. And in case of dishonesty, every principle of right would dictate that the purchaser should have the benefit of his bargain.

If the vendor so elects, he may specifically execute his agreement, and thus avoid damages. In such cases the vendor gets what he contracted for. And ordinarily this is what he should have. So, on the other hand, it is true that the vendor may file his bill for a specific performance. But he is not always compelled to do so, and in some cases his suit would be fruitless, the vendor having parted with the title to an innocent holder. The case of *Stewart v. Noble*, 1 G. Greene, 26, does not conflict with the foregoing conclusion. The covenantor in that case died in a short time after making the agreement, and in such case the purchase money, with interest, we think, would be the proper measure of damages. It is urged in the argument by appellant that the court erred in dissolving the attachment. The assignment of errors does not point to this objection, however, and it cannot therefore be considered. The court below having erred in the construction given to the contract declared upon, and in the charge to the jury as to the measure of damages, the judgment must be reversed.

Judgment reversed.

AFTER DEMURREE TO DECLARATION HAS BEEN SUSTAINED, amendment by plaintiff operates as a waiver of the right to review the correctness of said ruling on appeal: See *Stallings v. Newman*, 62 Am. Dec. 723.

CONTRACTS IN WRITING, HOW CONSTRUED: See *Menard v. Scudder*, 56 Am. Dec. 610, and note 618, 619, citing other cases; *Hutchinson v. Lord*, 60 Id. 381. The principal case is cited to this point in *Jacobs v. Jacobs*, 42 Iowa, 605.

SUM NAMED, WHEN DEEMED LIQUIDATED DAMAGES AND WHEN PENALTY: See *Curry v. Laver*, 49 Am. Dec. 486, and note 489, citing other cases; *Hallock v. Slater*, 9 Iowa, 600, follows and is decided on the authority of the principal case on this point. In *McIntire v. Cagley*, 37 Id. 678, the principal case is cited to the point that the terms used by the parties in a contract will not govern, in determining whether a sum fixed is a penalty or liquidated damages, but that the court will look into the case and treat it as one or the other, as the nature of the agreement demands. In *Jemison v. Gray*, 29 Id. 547, the court, following the principal case, declare that courts incline to treat such contracts rather as penalties than as liquidated damages if the matter is in doubt. Where the contract is for the performance of several acts and for the payment of a fixed sum on the breach of any of them, the courts construe such sum to be a penalty: *Trower v. Elder*, 77 Ill. 455, citing the principal case. Where such a sum is construed to be in the nature of a penalty, the proper measure of damages on breach of the contract is the amount of actual damage proved: *Lord v. Gaddis*, 9 Iowa, 267, citing the principal case.

MEASURE OF DAMAGES AGAINST VENDOR OF REALTY FOR FAILURE TO CONVEY: See *Rohr v. Kindt*, 39 Am. Dec. 53, and note 56, citing other cases; *Sweet v. Steele*, 5 Iowa, 354; *Yost v. Devault*, 9 Id. 63; *Sawyer v. Warner*, 36 Id. 334, both citing and following the principal case on this point. In *Beard v. Delaney*, 35 Id. 19, and *Hammond v. Hannin*, 21 Mich. 387, the principal case is cited to the point that if vendee has already paid the purchase price and the vendor is prevented from conveying by some cause beyond his control, and not the result of bad faith on his part, the measure of damages would be the purchase price, with interest. But if the vendor cannot convey because he has by fraud, or cause which he knew of and could prevent, disabled himself from making conveyance, the purchaser would recover substantial damages, including compensation for actual loss and for increase in value of the land: *Burdick v. Seymour*, 39 Iowa, 459; and *Allen v. Atkinson*, 21 Mich. 364, citing the principal case.

HAMPSON v. WEARE.

[4 Iowa, 13.]

STATUTE PROVIDING THAT WHEN NO CORPORATE PROPERTY CAN BE FOUND ON WHICH TO LEVY EXECUTION against the corporation the acting manager, or some member of the corporation, may be notified to appear before the court and show cause why the individual property of the members should not be made liable is not unconstitutional or unreasonable, under a constitution which declares that "stockholders shall be subject to such liabilities and restrictions as shall be provided by law."

PROCEEDINGS AND JUDGMENT OF COURT ARE CONCLUSIVE as to all matters within its jurisdiction, and cannot be impeached or set aside in a collateral proceeding.

EXECUTION ISSUED ON JUDGMENT AGAINST CORPORATION, after order that it be levied on individual property of the members, should follow the judgment, and run against the corporation, with a clause that it be levied on the property of the members; the clerk should not adjudicate on their membership by causing the execution to run against them personally, but should leave the officer to ascertain who are members as he may.

ACTION was commenced against the Fairfield and Mt. Pleasant Plank-Road Company, a corporation, by J. C. Weare, who obtained judgment therein. Execution issued against the company, and the sheriff returned that no corporate property could be found. Thereon a notice was served on the president and other members, to show cause why the individual property of the members should not be made liable, and on the hearing the court ordered that an execution issue against the property of the members. The execution issued thereon was against certain individuals by name, as members. An injunction was sued out to stay such execution. In the district court, a motion to dissolve such injunction was granted. The appeal is taken from such order dissolving the injunction. The remaining facts appear in the opinion.

J. F. Wilson, and Knapp and Caldwell, for the appellants.

Clinton and Baldwin, for the appellees.

By Court, WOODWARD, J. The first question is whether the injunction was properly granted. The district court had jurisdiction of the subject-matter, and personal service was made on the president and several directors of the corporation. Thus far, therefore, there is no question; but the petitioners complain that in the proceeding to charge the members of the corporation they had no notice, and therefore, as we understand, they intend to infer that the judgment ordering execution against them is invalid. The constitution, art. 8, sec. 2, provides that "the stockholders [of corporations] shall be subject to such liabilities and restrictions as shall be provided by law." By the common law, the stockholders of a corporation were not liable for the debts of the corporate body. This provision of the constitution was undoubtedly intended to render them liable in such degree and manner as the legislature should see proper. The legislature has accordingly directed that in such case the officers of the corporation shall be summoned in to show cause why the property of the members should not be held liable. These officers or managers are chosen by the members, and would always probably be stockholders themselves, and so liable with others, so that the interest of all is in some fair measure represented. The statute did not intend to drive the creditor to the inconvenience, expense, and delay of suite against all or any of the stockholders after he had obtained his judgment against the corporation. We do not regard this provision of the law as either unconstitutional or unreasonable.

The district court having acquired jurisdiction, all the other questions suggested by the complainant were within the province of that court to decide. It is not very clear that this court need to have noticed the above question concerning the proceedings in connection with the constitution, but we have adverted to it so as to leave no doubt. The other grounds upon which the application for an injunction was based were the following: That the private property of the members was exempt. This involved a judicial construction of sections 6 and 26 of the act of 1847. Another was, that the proceedings to render the stockholders liable should have been conducted under the code, and not under the act of 1847. Supposing them different, this admits of a question. A third was, that the court could not render them liable for more than the amount of their stock. A fourth ground was, that they were liable, even to the company, only on certain previous conditions, such as the advertisement of the calls for installments. It is very manifest that all these questions were for the court to determine before it rendered judgment that execution issue, and that its judgment upon them is conclusive, unless an appeal be taken. The proceeding now before us seeks to convert a bill praying for an injunction into a writ of error, to inquire into and correct the proceedings and judgment of the district court. It does, as is alleged by counsel, seek to go behind the judgment of the court awarding the execution against the property of the members. And this is a judgment quite as much as the judgment for the debt against the company. The proceedings and judgment of the court, within its jurisdiction, cannot be inquired into and set aside in this manner: *Elliot v. Peirsoll*, 1 Pet. 328; *Thompson v. Tolmie*, 2 Id. 157; *Ex parte Watkins*, 3 Id. 193; *United States v. Arredondo*, 6 Id. 691; *Voorhees v. Bank of United States*, 10 Id. 473; *Grignon v. Astor*, 2 How. 819; *Wright v. Marsh*, 2 G. Greene, 95.

The case has been unfortunately delayed in this court, through causes which no one could control. One of the members of the court, having been of counsel, could take no part in its adjudication. The other two differed in opinion upon some of the questions presented. A change having taken place, it is desired to bring the suit to a close. Whilst the causes assigned by the petitioners for injunction as grounds for its dissolution either are not sufficient for that effect or do not come to us in such manner that we can properly consider them, yet there is one not presented which is worthy of notice. The judgment was recov-

ered against the corporation, and not against individuals. But such proceedings were had that, in accordance with the statute, as we may for the present assume, the court rendered judgment (or ordered) that an execution issue against the property of the members. But there is no judgment against persons as members. There is no adjudication that certain persons were such. The execution, therefore, should follow the judgment, and run against the corporation, with a clause that it be levied on the property of the members. The clerk should not undertake to adjudicate on their membership by causing the execution to run against them personally, but should leave the officer to ascertain who are members as he may. And thus leave the party also to his proper remedy, if he believes himself not liable, or to his other proper course if he is liable. The execution was therefore irregularly issued, and for this reason, at least, was properly stayed by the injunction. Although one of us is not entirely satisfied with this view, nevertheless, as the cause comes to us in a manner unfavorable for reaching some of the questions, and as the object of this particular proceeding has passed by, we have concluded to place it upon the foregoing ground, hoping that if another case is presented upon the same matters we shall be able to reach the true questions, and shall have the benefit of a full bench in their consideration.

The judgment of the district court in dissolving the injunction is reversed.

WRIGHT, C. J., having been of counsel, took no part in the decision of this case.

SERVICE OF PROCESS ON CORPORATIONS.—It is obvious that personal service cannot be made upon a corporation. At common law, a corporation was regarded as represented by its officers, and service on them was held to be service on the corporation: *Merriwether v. Bank of Hamburg*, Dud. (S. C.) 36; *Glaise v. South Carolina R. R. Co.*, 1 Strobb. L. 73; *McQueen v. Middletown Mfg. Co.*, 16 Johns. 5; *Barnett v. Chicago & Lake H. R. R. Co.*, 4 Hun, 114; *Hartford City F. Ins. Co. v. Carrugi*, 41 Ga. 670. In early times a corporation could only be compelled to answer in an action at law by such service on an officer, and a *distringas* against the goods and chattels of the corporation; and if it had neither land nor goods, it was impossible to bring the corporate body into a court of equity. The great increase of these artificial bodies, and the extent of their operations, however, demonstrated the necessity for some more direct and efficient method of procedure against them, and the law-makers of more recent times have accordingly devised various expedients to supply the demonstrated want: *Newell v. Great Western Railway Company*, 19 Mich. 345; *Newby v. Colt's Pat. F. A. Co.*, L. R., 7 Q. B. Cas., 296. The law in this regard is now generally regulated by statute in the several states, and the general form of such statutes is to require service on

some particular officer of the corporation, or on its "general managing agent," this latter being the term most generally used in the several statutes. In cases where the statute authorizes service on a "head officer" or a "managing agent," the person on whom service may be made must be in the nature of a head officer whose knowledge would be that of the corporation: *Newby v. Colt's Pat. F. A. Co.*, L. R., 7 Q. B. Cas., 296; and who has the general supervision of the affairs of the corporation: *Upper Mississippi Transp. Co. v. Whittaker*, 16 Wis. 220; *Carr v. Commercial Bank of Racine*, 19 Id. 272; that is to say, one whose agency extends to all transactions of the corporation, and not to the management solely of a particular branch or department of its business: *Brewster v. Michigan Central R. R. Co.*, 5 How. Pr. 183; *Emerson v. Auburn*, 13 Hun, 150; *Weight v. Liverpool, London & Globe Ins. Co.*, 30 La. Ann. 1186. Courts, in construing such statutes, have held a service to be good which was made on a president, a secretary, or a cashier: *Chamberlin v. Mammoth Mfg. Co.*, 20 Mo. 96; *Glaise v. South Carolina R. R. Co.*, 1 Strobb. L. 73; *Gillig v. Independent G. & S. M. Co.*, 1 Nev. 247; *Willamette Falls Co. v. Williams*, 1 Or. 112; *McMurtry v. Tuttle*, 13 Neb. 232; *Hetzell v. Chicago & Alton R. R. Co.*, 77 Mo. 315. Service on a trustee who was not an officer of the company was held not sufficient: *Waco v. Wheeler*, 59 Tex. 554; but service on a general director has been held sufficient, and this though the director never notified the corporation or its board of officers: *Boyd v. Chesapeake & Ohio Can. Co.*, 17 Md. 195; *Emerson v. McCormick H. M. Co.*, 51 Mich. 5; it being held that the shareholders or members are not entitled to notice individually: *Pierce v. Somerset*, 10 N. H. 369; and further, that notice to an individual member alone would not be notice to the corporation, so as to hold it to trial: *Rand v. Proprietors Union L. & C.*, 3 Day, 441; even though no officers had been elected for many years: *Bache v. Nashville Hort. Soc.*, 10 Lea, 436.

An agent to effect and consummate insurances may be a managing agent: *Bain v. Globe Ins. Co.*, 9 How. Pr. 448; but a mere traveling agent who is authorized only to solicit, and who cannot consummate insurances, is not a managing agent on whom service of process may be made: *Parke v. Commonwealth Ins. Co.*, 44 Pa. St. 422. A general superintendent of a railroad company may for this purpose be considered its managing agent: *Commerce Bank v. Rutland & Washington R. R. Co.*, 10 How. Pr. 1; so a local express agent who supervises all the company's business in his town is a general agent: *Adams Express Co. v. St. John*, 17 Ohio St. 641; but one cannot be said to be such an agent who is a mere ticket-seller for a railroad company: *Doty v. Michigan Central R. R. Co.*, 8 Abb. Pr. 427; or a baggage-master: *Flynn v. Hudson Riv. R. R. Co.*, 6 How. Pr. 308; or the captain of a shipping company's steamer: *Upper Mississippi Transp. Co. v. Whittaker*, 16 Wis. 220; so it is held that the town clerk is not the managing agent of a municipal corporation: *Young v. Dexter*, 18 Fed. Rep. 201; but where a statute allowed service on a general or special agent, it was held that a conductor of a railroad train was such a special agent: *New Albany & Salem R. R. Co. v. Grooms*, 9 Ind. 243; *New Albany & Salem R. R. Co. v. Tilton*, 12 Id. 3. Service on one designated merely as agent of the corporation is held not sufficient: *Union Pacific R'y Co. v. Pillsbury*, 29 Kan. 652; unless, of course, a statute expressly provide otherwise. The return of service should always show the character in which service was made on the party: *Jones v. Hartford Ins. Co.*, 83 N. C. 499; *Powder Co. v. Oakdale C. & M. Co.*, 14 Phila. 166. A return showing service on "G. R., managing agent for the defendant corporation," was held not sufficient: *Oxford Iron Co. v. Spradley*, 42 Ala. 24; and the same ruling was made regarding a return of service on "A. B., one of the proprietors of

the corporation:" *O'Brien v. Shaw's Flat*, 10 Cal. 343; so where the statute allowed service on another officer only in case of absence or non-residence of the president, the return should show that the president was absent or a non-resident, to validate service on another officer: *St. Louis, Alton & T. H. R. R. Co. v. Dorsey*, 47 Ill. 288. Service on parties claiming to be the officers of a corporation, but who are not in possession of the offices, is not notice to the corporation: *Berrian v. Methodist Soc. of N. Y.*, 4 Abb. Pr. 424.

Service on Foreign Corporations.—At common law, jurisdiction of a corporation could not be acquired by service of process on its officer outside of the state which gave it existence: *McQueen v. Middletown Mfg. Co.*, 6 Johns. 6; *Barnett v. Chicago & Lake H. R. R. Co.*, 4 Hun, 114; *Peckham v. North Parish*, 16 Pick. 286. In many of the states, it is held that a foreign corporation can only be sued in a different state than that by which it was created by express statutory legislation authorizing such suits against foreign corporations having agents within the state, conducting the business for which they were organized: *Lathrop v. Union Pac. R'y Co.*, 1 McAr. 234; *Dallas v. Atlantic & Miss. R. R. Co.*, 2 Id. 146; *Augusta Bank v. Earle*, 13 Pet. 519; *Marshall v. Baltimore & Ohio R. R. Co.*, 10 How. 328; S. C., 18 Id. 404; *Ohio & Miss. R. R. Co. v. Wheeler*, 1 Black, 297; *Redmond v. Enfield Mfg. Co.*, 13 Abb. Pr., N. S., 332; *Howell v. Chicago & N. W. R. R. Co.*, 51 Barb. 378; *Whitehead v. Buffalo & Lake H. R'y Co.*, 18 How. Pr. 230; *Cumden Rolling M. Co. v. Suede Iron Co.*, 32 N. J. L. 15; but in Georgia the courts say that there is no reason why the same rules should not apply, and that a service on a foreign corporation should be made in the same manner as on a domestic corporation, that is, by service on its head officer or agent in the state: *Hartford Ins. Co. v. Carrugi*, 41 Ga. 671; *Bauknight v. Liverpool, London, & Globe Ins. Co.*, 55 Id. 195. Statutes are constitutional and just which provide that if a foreign corporation engages in business in the state it shall be suable there, in regard to such business transacted, and service on its managing officers there will be service on the corporation: *Moulin v. Insurance Co.*, 24 N. J. L. 234; the corporation invokes the comity of the state for the transaction of its business, and thereby waives the right to object to the mode of service which the state laws authorize: *Merchants' Mfg. Co. v. Grand Trunk R'y Co.*, 63 How. Pr. 459; *Railroad Co. v. Harris*, 12 Wall. 65; *Railroad Co. v. Whitton*, 13 Id. 270; *Bauknight v. Liverpool, London, & Globe Ins. Co.*, 55 Ga. 195; *Newby v. Coll's Pat. F. A. Co.*, L. R., 7 Q. B. Cas., 293; *National Cond. Milk Co. v. Brandenburg*, 40 N. J. L. 111; *Hartford Ins. Co. v. Carrugi*, 41 Ga. 671; *Knott v. Southern L. Ins. Co.*, 2 Woods, 479; *National Bank of Commerce v. Huntington*, 129 Mass. 444; *Barnett v. Chicago & Lake H. R. R. Co.*, 4 Hun, 114; *Ex parte Schollenberger*, 96 U. S. 369; overruling *Day v. Newark Ind. Rub. Co.*, 1 Blatchf. 628; *Pomeroy v. N. Y. & N. H. R. R. Co.*, 4 Id. 121; *Myers v. Dorr*, 13 Id. 22; *Hunee v. Pittsburgh & Cin. R'y Co.*, 8 Biss. 31. Appointment of an agent or attorney to receive process in accordance with the requisites of a statute amounts to a consent to the statute and binds the corporation: *Cnpen v. Pacific Mut. Ins. Co.*, 64 Am. Dec. 412; *Carstairs v. Mechanics' & Traders' Ins. Co.*, 13 Fed. Rep., 823; but though a statute requires the appointment of such an agent, if the corporation fails to comply with its provisions, it may nevertheless be sued, and service of process on its general agent will have the same effect as if the statute had been complied with: *Hagerman v. Empire State Co.*, 97 Pa. St. 534. By the service of process on the corporation, the property within the state may certainly be subjected to the judgment: *Brewster v. Michigan Central R. R. Co.*, 5 How. Pr. 183; *Barnett v. Chicago & Lake H. R. R. Co.*, 4 Hun, 114; *Bauk-*

eight v. Liverpool, London, Globe & Ins. Co., 55 Ga. 195; and it is held that the legislature may authorize service on an agent for a corporation, so as to be the basis of a judgment *in personam*: *McNichol v. United States Mercantile Rep. Ag.*, 74 Mo. 457. Service cannot be made on an officer accidentally within another jurisdiction; and a law sanctioning such service would be void; the character of such person as such officer does not accompany him to another jurisdiction: *McQueen v. Middleton Mfg. Co.*, 6 Johns. 6; *Moulin v. Insurance Co.*, 24 N. J. L. 234; *Newell v. Great Western R'y Co.*, 19 Mich. 345; *Peckham v. North Parish*, 16 Pick. 286; *Latimer v. Union Pac. R'y Co.*, 43 Mo. 105; *State v. Ramsey Dist. Ct.*, 26 Minn. 234; *Middlebrooks v. Springfield Ins. Co.*, 14 Conn. 301. But see *Pope v. Terre Haute Cartridge Co.*, 87 N. Y. 137. By statute, service may be provided for against corporations by publication, where personal service is impossible: *Barnett v. Chicago & Lake H. R. R. Co.*, 4 Hun, 114. The process of the United States courts may be served upon foreign corporations in each state, in the manner provided for by its state laws, and where the state statute provides that it may be served on any general agent in the state, the United States courts apply the rule to any such agent found in the district: *Knott v. Southern Life Ins. Co.*, 2 Woods, 479; *Lung Chung v. Northern Pac. R'y Co.*, 19 Fed. Rep. 254; *Ex parte Schollenberger*, 96 U. S. 376, overruling *Day v. Newark Ind. Rub. Co.*, 1 Blatchf. 628; *Pomeroy v. New York & N. H. R. R. Co.*, 4 Id. 121. But see *St. Clair v. Cox*, 106 U. S. 350.

MORROW v. WEED.

[4 IOWA, 77.]

GRANTING OF REHEARING DOES NOT IMPORT REVERSAL OF OPINION OF COURT, in Iowa, as it did under the common law.

WHETHER PROBATE COURT IS INFERIOR COURT, *quære*.

NO PRESUMPTION PREVAILS IN FAVOR OF JURISDICTION OF COURTS OF INFERIOR AND LIMITED POWERS, but such jurisdiction must be shown.

INFERIOR COURTS MUST PURSUE THEIR STATUTORY AUTHORITY STRICTLY, that is, in the manner dictated; but such a rule does not assume that the slightest possible deviation is fatal, but rather that the court must exercise the power substantially in the manner prescribed.

ADMINISTRATOR'S SALE IS NOT RENDERED INVALID because the petition for leave to sell decedent's realty for the payment of his debts fails to state the value of his personal property, or to set forth a specific account of the debts due from decedent, nor because the notice of sale was insufficient; it is within the jurisdiction of the probate court to decide on the sufficiency of the petition, and of the notice of sale, and if the decision thereon is erroneous, an appeal will lie to correct the error; and until reversed, such decision is binding on every other court.

NOTICE OF SALE OF REALTY OF DECEDENT, under statute authorizing publication "three weeks successively," is sufficient if published on some day in each of three successive weeks, though not published for three full weeks.

ACTION to recover possession of certain land by plaintiff, as the heir at law of one Morrow, against the grantees of the pur-

chaser, at the administrator's sale of said Morrow's estate. The administrator had applied for leave to sell the realty in dispute for the payment of decedent's debts, representing the debts of the estate to amount to about one thousand seven hundred dollars, and that the personalty was insufficient to discharge such debts. Publication was ordered and made, and the sale thereafter ordered. The sale was made and approved to one Brooks, who sold to defendant. The plaintiff sued for the land, attacking the administrator's sale on the grounds stated in the opinion. Judgment was rendered for plaintiff, and defendant appealed. On the hearing in this court, an opinion was rendered, in which the following rules were laid down, viz.: that the jurisdiction and regularity of proceedings of courts of superior and general powers are aided by a presumption in their favor; that no such presumption exists in favor of the jurisdiction of inferior courts, but that such jurisdiction must be proved, and when this is done, the same presumption prevails regarding their proceedings that does in favor of those of courts of superior powers; that courts having a right to decide a cause may determine every question which arises in it, and such decision is binding until reversed; that the essentials to jurisdiction are: 1. Authority conferred by law upon the court; 2. A petition, or whatever stands in its place; 3. Regular notice, wherever notice is required; and that jurisdiction of a court cannot be called into question collaterally if there appears to be a proper petition and a proper notice, where notice is required. Upon the delivery of this opinion, the appellee filed a petition for a rehearing, which was granted. The following opinion, rendered on the rehearing, states the further facts.

Richman and Brother, and David C. Cloud, for the appellant.

George S. Hebb and Henry O'Connor, for the appellee.

By Court, WOODWARD, J. In this cause a rehearing was granted upon the petition of the plaintiff and appellee. The granting a rehearing, in our present practice, does not import a reversal of the opinion of the court, as under the former and the common-law course. It is now but a reargument and reconsideration, on the petition of the party. When the court itself desires it, the cause is set down, technically, for reargument. In neither case does it necessarily imply that the court is convinced that it has fallen into error. In the present cause the rehearing was granted for several reasons. The questions are in their nature important, as bearing upon a large class of

sales of real estate. The pressure of business rendered it necessary to make the former opinion of the court too brief, perhaps not entering into a detailed exposition of the questions, as may have been desirable for the sake of clearness. We announced the rules, but left their application to the facts to be made by the mind of the reader. And further, the counsel seems to have misapprehended the thought and reasoning of the court, and to apply to one part of the cause reasoning or ideas which were intended for another. This arises from the opinion being too general. We have been willing, therefore, to reconsider the cause—to look at it more in detail, and see if we have fallen into error.

The subject is a difficult one. The decisions are very numerous, but for the most part do not stand on rule; at least, the rule they recognize is so general that it admits within its ample range almost any construction or application in details. The rule referred to is, that inferior jurisdictions and special authorities must show their jurisdiction, and must pursue their authority strictly. It was not necessary for the petitioner to labor to cite a long train of authorities to prove this proposition. It is stated in all the forms of which it is susceptible in the various cases, and is repeated in a large number of them. The doctrine is admitted by all. Whether a court of probate is an inferior court, in the technical sense, is not a question altogether so well settled. It is so called in many cases, it is true, and probably the courts of New York have settled the question for that state. But the question is held otherwise by the courts of some states, and it is doubted by others. This, however, has not been made a point in the present cause. Leaving that troublesome question, we have assumed the court to be an inferior one in the technical acceptation.

There is no difficulty in proving or in admitting the common rule in relation to inferior jurisdiction and special powers; the difficulty lies in the application of the rule to details. In reference to the exercise of a statutory power, we find various adjectives used, such as "closely," "strictly," "rigidly," "exactly." These are used by counsel. They are used in the headnotes of cases, and not unfrequently in the opinions of courts. Now, if they mean anything, it is that the authority is to be exercised literally; and yet it is believed that not a case can be found in which a court has said that such a power must be followed with literal exactness—that is, literally. The truth is, that the rule, stripped of this verbiage and divested of expletives, is that when a special authority or power is given, and

the manner of its exercise is pointed out, the power or authority must be pursued in the manner dictated. It is probable that no court has ever held that the slightest possible deviation is fatal, and yet this is the inevitable consequence if the use of the above adjectives is authoritative. The only true rule of construction in this respect, and that which the courts have sometimes in terms, and uniformly in practice, adopted, is that the power is to be exercised substantially in the manner prescribed. These ideas will be adverted to and illustrated hereafter, under the points made and the cases cited.

The argument derived from the supposed disregard for the interests of minor heirs, and the alleged sacrifice of their property, is undoubtedly entitled to its weight, but yet it does not afford much assistance towards forming a rule by which all cases are to be tried alike. It teaches, however, that a fair degree of strictness in the observance of the laws should be required. But there is no security for any one, except in the tribunal which administers the law in the first instance. There has always appeared to be a degree of absurdity in requiring a notice or other process to be served on an infant child, the only use of which would be the bringing the knowledge home to the friends incidentally. These friends, too, seldom discover any advantage to the minor in setting the proceedings right, and in keeping them correct, so as to be binding; but they complain of irregularities at a subsequent day, when circumstances have changed. And however true it may be that speculators stand ready to purchase cheaply the property of minor heirs sold under the order of court, there is undoubtedly an equal truth on the other side, which charges a dullness which does not perceive the enormity of a technical error until the property has greatly increased in value. Neither of these hostile views can have weight in forming a judicial opinion. But there is a thought well worthy of consideration, which is, whether the uncertainty of these sales by administrators and guardians does not prevent the property selling at a fair rate; and whether upholding them would not promote the interests of the heirs and minors themselves. Why does not property sold for taxes bring a respectable value? Every one knows that it is owing to the want of confidence in the title; and so it is, measurably, in respect to these other sales. These remarks are not made as an argument on which a judge can sustain a sale, but as a tolerably fair answer to the usual complaints of those who seek to set them aside. It is but too true that this class of persons have

but little care taken of their interests when it is greatly needed, and the law-maker cannot exercise too much caution in preserving their rights; but it is possible for both the law-maker and the judge to surround the proceedings with small technicalities which are detrimental to all who are concerned.

Before taking up the matter of the case, one or two explanatory remarks should be made. The cases on the subject of these sales are exceedingly numerous; and it is impossible, as well as useless, to attempt a review of all of them; but in this and the preceding examinations, all which were accessible have been examined; and all those cited by the plaintiff have been seen, unless it be where there is a misreference, of which there are several; and in those instances the case intended has probably been found. There may be instances where we shall have occasion to refer to cases which we have not seen; but this is only done upon the authority of other cases, or of proper books. This was remarked in the case of *Cooper v. Sunderland*, 3 Iowa, 114 [*ante*, p. 52], where many such were cited; but it was thought advisable to give the references for the benefit of those who may have access to them; and if some of them are not to the point, the fault is in the authors from whom they are taken. It will not be necessary to refer to that very large class of cases (many of which are cited by the plaintiff's counsel) which relate to the general rule before stated concerning courts of inferior and limited jurisdiction; or those which relate to special authorities; or those which teach that you may inquire into the jurisdiction of all courts; and those which lay it down as a fundamental rule (but subject to some exceptions) that a party who is to be deprived of his rights or property is entitled to notice. These ideas are too well settled to require support. We shall assume that when the books say the requisite facts must appear, etc., and use similar expressions, the appearance may be by the record proper—the entries—or by the papers of the case on file, or generally by evidence. And when the books speak of facts appearing on the face of the record, or on the face of the proceedings, they often refer to a manner of doing business which has never existed with us. In the most, if not all, of the older states a complete record is made in each cause; whilst with us this is not done even in our superior courts, but the files take the place of the greater part of the record proper.

We proceed now to examine the cause in detail, with reference to the objections made to the validity of the sale. The plaintiff shows title, and should recover unless that title has been

divested by the administrator's sale. From the nature and position of the cause, the objections to the sale were to be pointed out on the trial; and in the argument there are no pleadings setting them forth. The reasons given why the sale is invalid are the following: 1. That the administrator's petition for leave to sell the real estate does not state the value of the personal property; 2. That no specific account of the debts due from the deceased is filed with the petition; 3. That the publication of the notice of the sale was insufficient; 4 (in the petition for a rehearing). That the notice calling upon all persons interested to show cause why a sale of the realty should not be ordered was insufficient in itself.

The first objection is, that the administrator's petition for leave to sell does not state the value of the personal property. By the Iowa statute of 1843, chapter 162, subchapter 10, page 658, it is provided that when the goods and chattels of a deceased person are insufficient to pay all his debts, with the charges of administration, his administrator may sell the real estate upon obtaining a license therefor. By section 3 of the act it is provided that "in order to obtain such license the administrator shall present to the court a petition setting forth the amount of the debts due from the deceased, as nearly as they can be ascertained, and the amount of the charges of administration, and the value of the personal estate," etc. And section 9 provides that "if the facts set forth in the petition shall be proved to the satisfaction of the court, and if no sufficient cause be shown to the contrary, the court shall grant the license." That portion of the record and the facts on which the questions arise are given in the former opinion, the record being quoted literally. It will be perceived that the amount of the debts and administration charges is given, and then it is alleged that the personal estate is insufficient to discharge that amount. The question is whether this last allegation is sufficient. It is not literally what the statute calls for, but it is equivalent to saying that the personalty does not amount to so much as the debts and charges. A few cases will be referred to which approach the point nearest, and these will be principally from New York, where the courts have probably gone furthest on these questions, and perhaps further than sound reason dictates.

The case of *Denning v. Corwin*, 11 Wend. 648, was a suit for partition, in which the decree of partition was held void, for the reason that there had been no advertisement to bring in unknown owners, as was required by the statute. They were neces-

sary parties. But in this case, see *Foot v. Stevens*, 17 Id. 483, and *Hart v. Seixas*, 21 Id. 40, by the statute of New York an administrator petitioning to sell real estate was required to file an account of the debts and of the personal estate. In *Ford v. Walsworth*, 15 Id. 450, there was no such account filed, nor any substitute for it, and the order of sale was held invalid, and of consequence, the sale also. The same case was again before the court of appeals, in 19 Wend. 334, where it was held, in express terms, that secondary evidence might be received to show that an account was filed, if it could not be found among the papers of the court. The case cites *Jackson v. Crawfords*, 12 Id. 533. This case meets the observation before made concerning the meaning of the word "appear."

In *Bloom v. Burdick*, 1 Hill (N. Y.), 139 [37 Am. Dec. 299], the administrator did not file his inventory of the estate until he filed his petition for leave to sell realty; and the court permitted the inventory to stand for the account called for by the statute. This is a departure from the strict requirement of the statute. But the court reason that the account was required to show the present state of the property; and that if the inventory was made at that time—that is, at the time of filing the petition to sell—it answered the same purpose, and was sufficient to meet the demand of the statute. The idea of an equivalent or substitute is adopted. *Corwin v. Merrill*, 3 Barb. 341, was a case of a sale by an executor, under the authority of the surrogate's court. The sale was held void, because no account of the property and debts of the deceased was presented, and because there was no proof of any kind of the publication of the order. We come now to *Atkins v. Kinnau*, 20 Wend. 241 [32 Am. Dec. 534]. The statute of New York required that on a sale of real estate by the administrator, in the deed of conveyance, the surrogate's order should be set forth at large. The deed was held insufficient, for want of thus setting forth the order at large, at least until rectified by an application to the chancellor, under the provisions of another statute. The court say: "We do not say it should be literally recited, but it is impossible to say that a document is set forth at large unless every part of it is substantially presented." Here is an act—the copying of a paper—in its nature allowing, if not requiring, a greater degree of literalness than any other; and yet that court would not require a literal performance of it, but would hold a substantial one sufficient. This case contains other remarks bearing upon some of the points before us. The court say: "It is clear that we can-

not, in this collateral proceeding, inquire whether, in fact, there were any debts due, over and above the personal estate." And speaking of the difference between want of jurisdiction and error, the court proceed: "In the former case the whole is *coram non judice*, and void; in the latter, the proceeding cannot be impugned in a collateral action, even though it be erroneous on its face, and even though it relate to a fact which in a former stage of the proceeding might have been essential to confer jurisdiction;" citing *Betts v. Bagley*, 12 Pick. 582, which is quoted below. In this case the court seem to come near to deciding on the sufficiency of the account presented. The question was, in fact, whether the paper was an account. It came near to being what our statute requires, that is, a statement of the amount of indebtedness, rather than an account of the debts. It contained three parts: 1. The amount of debts owing in New Jersey; 2. The amount owing in New York; and 3. A specific liability to a certain person on a certain matter. The court sustained it on the last, and did not adjudicate the two former.

The plaintiff in the case at bar makes particular reference to the case of *Corwin v. Merritt*, *supra*; to *Matter of Underwood*, 8 Cow. 59, in which a publication for six weeks was held not to be a sufficient compliance with an order directing a notice of ten weeks; and to *Kenney v. Greer*, 13 Ill. 432. The only matter in point in this last case is the reiteration of the general proposition concerning the conclusiveness of the judgment of courts of limited jurisdiction. The discussion is upon the character of the circuit courts of the state of Illinois. *Smith v. Hileman*, 1 Scam. 323, held that when the statute requires an order to be set out in full, it is not sufficient to set it out in substance. This is, so far, against *Alkins v. Kinnan*, *supra*.

The case of *Young v. Lorain*, 11 Ill. 625 [52 Am. Dec. 463], was an action for the recovery of land sold at a guardian's sale, and impeaching the former proceedings. The former guardian resigned, and a new one was appointed, by whom the land was sold; and it was doubted whether the first guardian could resign. The supreme court say: "Remember, the objection is made in a collateral proceeding, and not on appeal. In this collateral action you cannot inquire into the sufficiency of the reasons for removing the guardian; the court had jurisdiction to remove." Objection was also made to the sufficiency of the petition in its allegations, and the court says: "It states all the statute requires, except that, instead of averring that 'the guardian has faithfully applied all the personal estate.' etc., it states that no

personal property of the ward had ever come to his hands. We do not think this departure from the expressions of the statute fatal to the jurisdiction of the court, although it must be admitted that the averment is somewhat equivocal. The meaning of the statute is that the guardian should have faithfully applied all the accessible personal estate; and we are disposed to hold that the averment here is equivalent to that." This is quite as strong a case, if not a stronger one, than that at bar. The case of *Ewing v. Higby*, 7 Ohio, 198, was on an administrator's sale. There was a question of minors having notice. The guardian of two appeared. "The court had the return of process served on Samuel and John, and the appearance of the guardian of the lessors, and acknowledgment by him, in open court, of notice of the petition. The court, when they made the order, must have determined that by serving process on Samuel and John, and by the appearance of the guardian of the others, the four heirs were parties to the petition, within the meaning of the act; and this was a matter of which they had jurisdiction. Indeed, they were compelled to determine this question. They could not get along without." Here was a question of the sufficiency of notice, service, and appearance, and whether persons were made parties; and the higher court held it a matter for the lower court to decide, and would not inquire into it collaterally. In *Paine v. Mooreland*, 15 Id. 435 [45 Am. Dec. 585], the doctrine is that the court acquire jurisdiction in attachment by the filing of the proper affidavit, the issuing of the writ, and the attachment of the property; and that if after this they render judgment without publication, it is not void; but that having acquired jurisdiction, it is not lost by a subsequent irregularity.

Now, taking the averment which the petition in the case at bar does make, and the finding of the court as to the necessity of the sale, we feel that we are justified by the cases in holding that the averment of the petition is an equivalent for the statute; and that it was within the jurisdiction of the court to decide on the sufficiency of the petition. Other cases also, and some hereafter cited, have a bearing upon and support the same doctrine.

The second objection made in the principal cause is, that there is no specific account of the debts due from the deceased. Upon this it is sufficient to remark that the statute does not require it. It calls for the amount of the debts and charges, and not for an account of them. It is not like the New York statute, and therefore *Ford v. Walsworth*, 15 Wend. 450, S. C.,

19 Id. 334, and *Corwin v. Merritt*, 3 Barb. 341, are not entirely similar to the present case. In the case before us, the amount of the debts and charges is given. There was enough alleged to call into action the powers of the court. If a demurrer should be made the test, as suggested by counsel, we doubt whether he would venture a general demurrer to this petition under the old practice, when judgment on demurrer was final.

The third objection to this sale is, that the publication of the notice of sale was not sufficient, for that it should have been published three full weeks, whilst it was published but two full weeks and a fraction. The act (c. 10, sec. 13) authorizes the court, in lieu of another notice, to order notice to be published "three weeks successively, in any newspaper." In this cause, the court ordered it published in that manner. It was published on the thirty-first of July, and the seventh and fourteenth of August, and the sale was on the fifteenth. In the former opinion we said that the terms of this act admit of the question whether three full weeks were required, or only a publication on some day in each of three weeks so as to insure at least two full weeks' notice. It may be suggested appropriately in reference to this, that whilst petitioner is pressing for a strict, rigid, even literal, application of the statute, on this point he departs from this course, and wishes a little relaxation of the words; he seeks a meaning; he puts a construction upon them. They do not say three full weeks, but he says they mean that; that that is the true and legal construction. It seems to us that the administrator has in this, at least, followed the statute strictly, and we should be loth to apply a construction which loosened the terms, *ex post facto*, as it were, in order to destroy a sale. The only adjudication of the court upon these words of the act would be in the order for publication, and that is in nearly the same language with the act. The latter says "three weeks successively," and the order says "three successive weeks." It is probable that any one giving an *a priori* and directory construction to these words would prefer to give that which called for the longest time, not because the words necessarily mean that, but in consideration of the object of the publication. When, however, an accurate construction becomes necessary, and the consequence is the sustaining or overthrow of sales and titles which have stood for ten years, we cannot say that the statute necessarily means, in these words, more than it says. We are referred to the case of *Early v. Doe*, 16 How. 615, S. C., 21 Curt. Cond. R. 317, as conclusive for the other view. We

would refer to the case as sustaining the view we have taken. Let us look at the case carefully, and see the facts and the reasoning of the court. It relates to the notice of a sale for taxes. The statute required the notice to be inserted "once in each week, for at least twelve successive weeks." The notice was inserted from the twenty-sixth of August to the fifteenth of November, inclusive, the latter day being the day of sale, and making eighty-two days, and not eighty-four. The court say the question is whether the statute means that twelve insertions in successive weeks is sufficient notice. "We do not doubt," say they, "if the statute had been 'once in each week for twelve successive weeks,' a previous notice of the particular day of sale having been given to the owner, that it might very well be concluded that twelve notices, in different successive weeks, though the last insertion was on the day of sale, was sufficient." This remark covers the present case precisely. Then the court proceeds: "But when the legislature has used the words 'for at least twelve successive weeks,' we cannot doubt that the words 'at least,' as they would do in common parlance, mean a duration of the time there is in the twelve weeks, or eighty-four days." They say that the other construction leaves out of consideration the words "for at least." There is a slight ambiguity in a part of their remarks, but they say explicitly, We do not doubt that if the statute had been "once in each week for twelve successive weeks," it would have been good, though there were not eighty-four days.

The fourth objection to these proceedings is made to the notice of the pendency of the petition for leave to sell. The objection is to the qualities of the notice itself. The notice is thus presented in the record of the proceedings of the probate court: "At a court held at Bloomington, on the twenty-fifth of July, 1846, the administrator filed the following affidavit: 'All persons interested are hereby notified,' etc., that he would petition for license to sell, the hearing of which will be on Saturday, the twenty-fifth instant, at Bloomington, before his honor T. S. Parvin, judge of probate, when and where," etc. The affidavit of publication attached is entitled of the territory of Iowa, and county of Muscatine. The objections are, that the county and state do not appear in the notice; the lands are not described; and the court is not named, but the judge only. It will be noticed that this is but the recital in the affidavit or record of the body of the notice, and it does not import that there was not a proper caption showing the state, county, and

even the court. But we do not propose to examine this objection in detail, for there are two observations to be applied to it: 1. The court finds, expressly, "that all interested have been duly notified;" and under this we will presume that the paper possessed the requisite external forms; and 2. This objection is made for the first time now, on the petition for a rehearing. It was not presented on the first argument. The first three objections named above were the ones presented, as shown by the written brief of the party.

But however this may be, we must set down his record of facts and the adjudication of the court as sufficient to cover the objection. In this we feel sustained by the cases before cited, but desire to add two or three to the list, as throwing light on these questions. The case of *Dyckman v. Mayor etc. of New York*, 5 N. Y. 434, is referred to and commented on in *Sheldon v. Wright*, Id. 497, so fully that it seems requisite to give the substance of the former case, first, upon the present point. That was a case of proceedings under the right of eminent domain. The city took a portion of the appellant's land, upon which to build the reservoir of the Croton water-works. The statute law is, that the commissioners should first endeavor, *bona fide*, to purchase the land by private agreement; but if the owner and commissioners cannot agree, then the vice-chancellor has jurisdiction of the matter, upon proper proceedings, to condemn the land. Either party can bring it before that officer by petition. In the above case, the mayor, etc., filed the petition, and alleged such disagreement, and the petition was sworn to by one of the commissioners. It was held that the disagreement between the owner and the commissioners was an essential prerequisite to the jurisdiction of the vice-chancellor.

In a collateral proceeding, attacking those by which the land was condemned, the appellant sought to contradict and disprove this allegation. This is the point of present attention. It was held to be an issuable fact. Foot, J., who delivered the opinion, says: "The real question in this cause is whether the appellant could contradict the record by proof, and thus collaterally open and review the proceedings, etc. On examining the authorities respecting the conclusiveness of records on jurisdictional questions, there will be found great and irreconcilable diversity." He then takes the proposition that when the jurisdiction of a court of limited authority depends upon a fact which must be ascertained by that court, and such fact appears and is stated in the record of its proceedings, a party who had

an opportunity to controvert the jurisdictional fact, but did not, and contested upon the merits, cannot afterwards, in a collateral action against his adversary, impeach the record and show the jurisdictional fact therein stated to be untrue; and he cites several authorities.

The case of *Sheldon v. Wright*, 5 N. Y. 497, was ejectment for land, brought by the heir, in which he attacked the sale made by the administrator for the payment of debts. The second point made related to the publication of the order to show cause. This is held to be "a jurisdictional fact, of the evidence of which the surrogate must necessarily judge. He has judged and decided that the order was published as required by the statute, and his judgment appears on the record of his proceedings." The question arises, How does this appear? The record recites, in the usual manner of record recitals, that the order had been published. The court then proceeds: "The first inquiry is, Can that judgment be overhauled in this collateral action at the instance of the appellant?" They refer to *Dyckman v. Mayor*, *supra*, as deciding a similar question, but say: "An important particular in which the present case differs from that of *Dyckman v. Mayor* is, that in the latter *Dyckman* appeared in the summary proceedings and litigated, while in the former the appellant did not appear. The question then arises, Does his omission place him in a more favorable condition for litigating the jurisdictional fact? or in other words, can a party to a judicial proceeding, by lying by and omitting to appear, acquire a right to open the proceedings at any time, and litigate in a collateral action a jurisdictional fact? It will be perceived at once that if the right depends on appearance or non-appearance, the fact that the party claiming it has been served with personal or statutory notice makes no difference." The court here means, it is presumed, that it makes no difference by which method the party has been served; for they go on and say that if there is any difference, it is in favor of the personal notice, for the reason that this is, in general, more difficult to prove than one by publication, after a lapse of time. They proceed: "It cannot be, therefore, that the acknowledgment or denial of the right of a party to disregard the record and collaterally litigate a jurisdictional fact depends on his appearance or non-appearance; but it rests upon a broader and deeper ground—which is, that when a court or judicial officer, in the exercise of rightful functions, adjudges upon a matter, that judgment is final, and is conclusive on the facts which it embraces." The court

then say there are some qualifications of this principle, one of which is, "that if the court or officer which pronounces the judgment has not jurisdiction of the subject and parties, the judgment is not conclusive, and the difficult and important point for decision (applying to the case then in hand) is, whether the judgment of the surrogate is conclusive on the fact of the publication of the order for persons interested to appear. In my opinion, it is. When Thompson, C. J., said, in the case of *Borden v. Fitch*, 15 Johns. 141 [8 Am. Dec. 225], that 'the want of jurisdiction is a matter that may always be set up against a judgment;' and Spencer, C. J., quoted his language with approbation in *Mills v. Martin*, 19 Id. 33; and Sutherland, J., repeated it in *Latham v. Edgerton*, 9 Cow. 229—these distinguished judges doubtless intended only to say that the want of jurisdiction might always be set up against a judgment, when it appeared on the record or was presented in any other unexceptionable manner." "We then have a case where a party resided within the jurisdiction, where there is evidence on the record that the statutory notice was given, and the judgment that such notice was full and perfect; and we are asked, in a collateral action, to disregard the surrogate's judgment and open and investigate the jurisdictional fact of publication of the notice."

In the foregoing case, the facts which were proved are shown, and the court refuse to look back to them. The judgment was no more full than in the case at bar. This case shows that the court does and must decide on its jurisdiction in these matters. It is true, it goes the length that you cannot contradict the record on an appropriate matter found or adjudicated, but there is much other authority also to the same point. That decision is by a court of high character, and is a recent one, being made in 1851. The case of *Miller v. Brinkerhoff*, 4 Denio, 118 [47 Am. Dec. 242], is to the doctrine that when certain facts are to be proved to a court of special and limited jurisdiction, as a ground for issuing process, if there be a total defect of evidence as to any essential fact, the process will be declared void, in whatever form the question may arise. But when the proof has a legal tendency to make out a proper case, then, although the proof may be slight and inconclusive, the process will be valid until it is set aside by a direct proceeding for that purpose. In the one case, the court acts without authority; in the other, it only errs in judgment upon a question properly before it for adjudication. In one case, there is a defect of jurisdiction; in the other, only an error of judgment.

There are a few points upon which the former opinion of this court appears to have been misconceived, probably on account of its too great generality. One of these relates to the probate court being satisfied of its own jurisdiction. We have not held that the court may assume jurisdiction, and that this shall be conclusive except on error. We have recognized those cases which hold that where there is a want, a destitution, of evidence of the jurisdictional facts, the question may be raised collaterally; but where there is such evidence—for instance, where there is a petition, a notice, etc., and the only question is of its sufficiency under a construction of either the law or the paper itself—then so far the court must judge of its own jurisdiction, and its adjudication is good until set aside in some regular manner.

The order of the probate court is not to give “twenty-one days’ notice.” This is a construction, and involves one of the questions of the case, and therefore is not to be gratuitously assumed. The argument of counsel for petitioner on rehearing intimates that there is no proper evidence of record, or in the papers, of the advertisement of the sale. Among the proceedings of the district court we find (over the hand of the judge of that court) that “it was shown and admitted that the notice of sale was published,” as before stated. This is a sufficient proof of the fact, certainly, for the purposes of the court; and we would suppose we had misapprehended the objection, were it not too clear on the argument. In this cause we did not intend to place any part of the decision upon the ground of the confirmation of the sale by the probate court. This idea applies to sales by guardians of the estate of their wards, and therefore has place in the opinion in the case of *Cooper v. Sunderland*, 3 Iowa, 114 [*ante*, p. 52], but it does not apply to an administrator’s sale. In the preceding opinion in this cause, and that of *Cooper v. Sunderland*, *supra*, we speak of correcting the errors of the probate court, on appeal, etc. Our language has been taken too literally. Besides appeals, there are writs of *certiorari*, motions to set aside, and special motions, etc. The language is intended to indicate any of the methods of correcting errors and proceedings, whether by appeal, writ of error, *certiorari*, or motion, to the same court; and is used to point to any or all of these modes, as distinguished from a collateral impeachment of the proceeding.

We have thus endeavored to review this cause with a reference to those cases which approach the nearest to the precise

points made, and which have been most rigid in their construction, and are constrained to abide by the conclusion at which we arrived in the former opinion. But we are supported and strengthened yet more, when we refer to the cases cited in the former opinions, and principally in *Cooper v. Sunderland*, *supra*, from the federal courts, and especially those of *Grignon v. Astor*, 2 How. 319; S. C., 15 Curt. Cond. R. 125; *McPherson v. Ourkiff*, 11 Serg. & R. 429 [14 Am. Dec. 642]; *Thurston v. Hancock*, 11 Mass. 227; and the later one of *Betts v. Bagley*, 12 Pick. 571, 582. It is by no means clear but that these cases establish a doctrine going much beyond what is demanded to sustain the proceedings in the present cause.

The former opinion of this court is sustained, and the judgment of the district court is reversed.

PROBATE COURTS, WHETHER INFERIOR COURTS: See *Bloom v. Burdick*, 37 Am. Dec. 299, and note 303; *Worthy v. Johnson*, 52 Id. 399, note 407; *Tucker v. Harris*, 58 Id. 483, note 503; *Schultz v. Schultz*, 60 Id. 335; *Clarke v. Perry*, 63 Id. 82, note 83.

JURISDICTION OF INFERIOR COURTS IS NOT PRESUMED, BUT MUST BE SHOWN; and when shown, the regularity of their proceedings is presumed, and conclusive until reversed: See *Clarke v. Perry*, 63 Am. Dec. 82, and in note 83, see list of prior cases in this series on the conclusiveness of judgments of probate courts; see also *Bloom v. Burdick*, 37 Id. 308, note; *Palmer v. Oakley*, 47 Id. 41; *Reynolds v. Stansbury*, 55 Id. 459, and note; *Cooper v. Sunderland*, *ante*, p. 52. The principal case is cited to this point, and the principle laid down recognized, in *Little v. Sinnett*, 7 Iowa, 330; *Frazier v. Steensrod*, Id. 341; *Suiter v. Turner*, 10 Id. 526; *State v. Berry*, 12 Id. 60; *Boher v. Chapline*, Id. 206; *Thornton v. Mulquinne*, Id. 554; *Long v. Burnett*, 13 Id. 35; *Bonsall v. Isett*, 14 Id. 312; *Van Horn v. Ford*, 16 Id. 584; *Pursley v. Hayes*, 22 Id. 20; *Shawhan v. Lafer*, 24 Id. 227; *Good v. Norley*, 28 Id. 194; *De Tar v. Boone Co.*, 34 Id. 491; *Lyon v. Vanatta*, 35 Id. 525; *Ryan v. Varga & B. M. R. R. Co.*, 37 Id. 81; *Read v. Howe*, 39 Id. 560; *Bennett v. Hetherington*, 41 Id. 150; *Farmers' Ins. Co. v. Highsmith*, 44 Id. 333; *Hahn v. Kelly*, 34 Cal. 427, 428; *Salisbury v. Sands*, 2 Dill. 277. The principal case is distinguished in *Sears v. Livermore*, 17 Iowa, 290, the latter being a case of rights arising out of contract, and not from a judicial sale.

SMITH v. SILENCE.

[4 Iowa, 321.]

DEMURRER TO PETITION IS WAIVED BY FILING OF ANSWER BY DEFENDANT. CALLING WOMAN WHORE IS ACTIONABLE of itself, without proof of special damage.

WIFE WHO IS DESERTED BY HUSBAND, and who continues to live apart from him, and is dependent on herself for support, may sue and be sued as a *feme sole*.

SLANDER. Plaintiff sued defendant for damages for slanderous words spoken of her, in calling her a whore. Defendant demurred, but afterwards answered. On the trial it was shown the plaintiff was a married woman, and had a husband still living. Defendant moved for a nonsuit, on the ground that plaintiff could not properly sue alone, but the nonsuit was denied. The charge of the court to the jury was, that to call a woman a whore is actionable in itself, without any allegation of special damage. To such ruling and charge defendant excepted. Verdict for plaintiff. Defendant appealed.

Tripp and Pollock, and Wiltse and Blatchly, for the appellants.

Smith, McKinlay, and Poor, for the appellee.

By Court, STOCKTON, J. The demurrer was waived by defendant's answer to the petition. This is of the less consequence in this case, as the same question is raised on the instruction given by the court to the jury, "that to call a woman a whore is actionable of itself, without proof of special damage." We think there was no error in this instruction. The question has been settled by the supreme court of this state, first in the case of *Cox et ux. v. Bunker et ux.*, Morris, 269, and that decision has been subsequently confirmed: See *Reynolds v. Daley*, Supreme Court Iowa (not published); *Abrams v. Folshee and Wife*, 8 Iowa, 274 [*ante*, p. 77]. We are aware that the law is otherwise in some of the states. In New York the common-law rule is retained, and the words are actionable only "where the charge, if true, would subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment:" *Young v. Miller*, 3 Hill (N.Y.), 22. In other states the rule has been relaxed. In some by statute, as in North Carolina, South Carolina, Indiana, Illinois, Kentucky, and Alabama: *Morris v. Barkley*, 1 Litt. 64; *James v. Clarke*, 1 Ired. L. 397; *Watts v. Greenlee*, 2 Dev. L. 115; *Alcorn v. Hooker*, 7 Blackf. 58; *Regnier v. Cabot*, 2 Gilm. 34; *Philips v. Wiley*, 2 Litt. 153; *Sword v. Nestor*, 3 Dana, 453; *Williams v. Bryant*, 4 Ala. 44. In others by the progress of the same enlightened sentiment acting through their courts of highest resort: *Miller v. Parish*, 8 Pick. 385; *Woodbury v. Thompson*, 3 N. H. 194; *Frisbie v. Fowler*, 2 Conn. 707; *Wilson v. Robbins*, Wright, 40; *Stevens v. Handly*, Id. 121; *Andres v. Koppenheaver*, 3 Serg. & R. 261 [8 Am. Dec. 647]; *Harker v. Orr*, 10 Watts, 245.

The only other question raised is upon the refusal of the court to order a nonsuit, on motion of defendants, upon the

ground that the plaintiff was a married woman, and had not obtained authority from the district court to sue in her own name. The testimony was, that about fifteen years before, James W. Smith, the husband of plaintiff, left her and went to New Orleans to reside; that he wrote to his wife for two years and a half after he left, about which time she was induced to believe that he had died in New Orleans of yellow fever; that she remained in this belief until the autumn of 1854, when he wrote to his father in New York, from Havana, in Cuba, inquiring about his family; that he also wrote to his wife, the plaintiff, and requested her to come to Havana, and live with him; that in March, 1855, plaintiff went to Havana, and went to the house of said Smith; that from what she saw and heard of him when she arrived she refused to live with him, and returned to the states as soon as she was able to get away from the island; and that Smith had accumulated property in Havana; but it does not appear that he had ever made any provision for the support of his family. Without determining whether the non-joinder of the husband, admitting it to have been a material defect, could be taken advantage of by motion for a nonsuit, instead of by plea in abatement, and without inquiring whether the fact of such non-joinder, however objected to, was sufficient to have dismissed the suit, we proceed to the more important inquiry, whether the desertion and continued abandonment of the plaintiff by her husband was not sufficient authority for her to sue in her own name.

If the husband be *civilitur mortuus*, or transported for a number of years, or has been abroad seven years and not heard from, though he voluntarily left the country, the wife may be sued alone upon a contract made by her during that time: *Grasser et ux. v. Eckart et ux.*, 1 Binn. 575; *Lambert v. Atkins*, 2 Camp. 273; *Robinson v. Reynolds*, 1 Atk. 175 [15 Am. Dec. 673]; 1 Ch. Pl. 67. In *Gregory v. Paul*, 15 Mass. 81, the authorities on the question are collected and reviewed by Putnam, J. Where the husband was exiled, the wife was permitted to sue in her own name: Co. Lit. 132 a; and the same reason applying where the husband had abjured the realm, the wife was allowed to sue as a widow for her dower. She has in like case been permitted to alien her land without her husband. She is exempted from the disabilities of coverture. She may maintain trespass: *Eliza Wilmot's Case*, Moore, 851. She may sue for her jointure; and she may be sued as a *feme sole*: *Dubois v. Hole*, 2 Vern. 614. She may make a will, and in all things act as if her

husband was dead: *Countess of Portland v. Prodgers*, Id. 104. As the court well observed, the necessity of the case required that she should have such a power. It has been uniformly considered that banishment or abjuration was a civil death of the husband; and the banishment of the husband, even for a limited time, operates as a removal of the disabilities of coverture, so far as to enable the wife to sue and be sued as a *feme sole*, although the time of banishment had expired when the action was brought: *Newsome v. Bowyer*, 3 P. Wms. 37.

The facts and circumstances which should be considered as proof of his having abjured the realm have been liberally regarded. Thus, where the husband resided abroad, leaving his wife to trade and gain credit as a *feme sole*, this has been considered as sufficient to entitle her to obtain credit, and to render her liable to be sued as a *feme sole*: *De Gaillon v. L'Aigle*, 1 Bos. & Pul. 357. In *Gregory v. Paul*, 15 Mass. 31, above cited, the plaintiff had been domiciled in Massachusetts many years as a *feme sole*. Her husband was an alien. He never was in this country, and was not expected ever to be. He had abandoned his wife, and for a number of years made no provision for her support in his own country. He had not abjured his country, but he had compelled her to abjure it. The court further say: "If the husband had been a native citizen, and had deserted his wife and become a subject of a foreign state, the law would be clear for her on the adjudged cases. Miserable, indeed, would be the situation of these unfortunate women whose husbands have renounced their society and country, if the disabilities of coverture should be applied to them during the continuance of such desertion." The court held that the wife was competent to sue and be sued as a *feme sole*, and that her release would be a valid discharge for any judgment she might recover. The principle decided in *Gregory v. Paul*, *supra*, was subsequently reaffirmed by the supreme court of Massachusetts in the case of *Abbot v. Bayley*, 6 Pick. 89. The husband had driven the wife from her home by his cruelty and ill usage; and for twenty years she had acted as a *feme sole*, and been treated as such by those with whom she had dealings. The husband, so far from supporting her, had been living in cohabitation with another woman. She had been obliged to live apart from him and get her living by trading, her husband residing in another state. It was held that she was entitled to sue as a *feme sole*. In *Gregory v. Pierce*, 4 Met. 478, the same court say: "The principle is now to be considered as settled in the state, that where the husband was

never within the commonwealth, or has gone beyond its jurisdiction; has wholly renounced his marital rights and duties, and deserted his wife—she may make and take contracts, and sue and be sued as a *feme sole* in her own name. It is an application of an old rule of the common law, which took away the disability of coverture when the husband was exiled or had abjured the realm."

To accomplish this change in the civil relations of the wife, the desertion of the husband must be absolute and complete. It must be a voluntary separation from and abandonment of the wife, embracing both the fact and intent of the husband to renounce *de facto*, and as far as he can do it, the marital relations, and leave his wife to act as a *feme sole*. Such is the renunciation, coupled with a continued absence in a foreign state or country, which is held to operate like an abjuration of the realm: *Gregory v. Pierce*, *supra*. See also *Edwards v. Davis*, 16 Johns. 286; *Cornwall v. Hoyt*, 7 Cow. 420; *Troughton v. Hill*, 2 Hay, 406; *Wright v. Wright*, 2 Desau. 124; *Dean v. Richmond*, 5 Pick. 461; *Lewis v. Lee*, 5 Dow. & Ry. 98; S. C., 3 Barn. & Cress. 291; *Ex parte Frank*, 7 Bing. 762; *Williamson v. Dawes*, Id. 294.

The case of the present plaintiff, it seems to us, presents as cogent reasons for the application of this doctrine as any of those cited. She had been deserted by her husband for fifteen years. It does not appear that during all this time he had furnished her any means of support. And she was left to her own labor, and to the credits she might be able to obtain as a *feme sole*. For more than ten years she does not hear from him; she does not know where he is, and is induced to believe he is dead. When she does hear from him, he is in a foreign country, and writes for her to come to him. Forgetful of the fifteen years of desertion, she seeks his home in a foreign land. She no sooner arrives in Havana than, having reason to believe that he is living in a state of concubinage with another woman, she determines not to live with him, declares her intention of returning, and takes the first opportunity of doing so. From these facts, we think that the following positions are established; 1. That Smith, the husband, had voluntarily separated from and abandoned his wife; 2. That the desertion by him was absolute and complete, and was continued for so long a time that he is to be considered as civilly dead; 3. That this renunciation by the husband, coupled with his departure to a foreign state, and his continued residence there, amounting to an abjuration of the realm, shows not only the fact of abandonment, but the intent,

so far as he could, to leave the wife free to act as a *feme sole*. Nor do we think that the relation between the parties has been restored by the request of the husband that the plaintiff should join him at Havana, nor by the wife going to that place and remaining at his house during her stay in the island. The son testifies that the plaintiff, immediately after her arrival, upon being informed of the course of life of her husband, expressed her determination not to live with him, and to return to the states; and that she did return as soon as she could leave the island. The husband had no right, under the circumstances, to require her to abjure her country, nor to remain with him, if she believed he was living in a state of concubinage with another woman.

The only remaining question is, Should the plaintiff have obtained authority from the district court, as a married woman abandoned by her husband, to act as though unmarried, and to sue in place of her husband? Code, secs. 1456, 1459. We think she had this right, without the additional authority which the decree of the district court could confer. The remedy afforded by the statute is cumulative, and is more particularly applicable to cases where the abandonment is not such as to imply a total renunciation of marital rights, or where there appears to be no intention of leaving the wife free to act as a *feme sole*. We must say, in conclusion, that in our opinion, reason, justice, and authority concur in impressing us with the correctness of the rule we have sought to lay down. We see no principle upon which it can be considered necessary or proper that the husband should be a party plaintiff in this suit. The statute, Code, sec. 1676, requires that the suit shall be prosecuted in the name of the real party in interest. What interest, we may inquire, has the husband in the event of this suit? For fifteen years he has renounced the society of his wife, and lived apart from her; he has abjured his country, and during all the time, though able to do so, has made no provision for the support or maintenance of his wife and children. It would be wholly irreconcilable with our notions of law and justice that he should now be entitled to her earnings, or the little property she may have accumulated by her labor. And such has been the indifference he has so long manifested for her happiness or welfare, that it is more than idle to claim that he is the injured party, by a tort upon her person, property, or character, or entitled to the damages received in an action brought for a redress of her wrongs.

Judgment affirmed.

SLANDER.—WORDS IMPUTING TO FEMALE WANT OF CHASTITY ARE ACTIONABLE PER SE: *Brooker v. Coffin*, 4 Am. Dec. 337; *Elliot v. Aileberry*, 5 Id. 631; *Ware v. Cartledge*, 60 Id. 489. The principal case is cited, and the rule there laid down is followed, in *Beardsley v. Bridgman*, 17 Iowa, 292; *Cleveland v. Detweiler*, 18 Id. 300; *Haynes v. Richey*, 30 Id. 77; *Mayer v. Schlechter*, 29 Wis. 648.

WIFE ABANDONED BY HUSBAND, RIGHT OF TO SUE AS FREE SOLE: See *Wright v. Hays*, 60 Am. Dec. 200, note 206, where other cases are collected; *Love v. Megahan*, 63 Am. Dec. 306, and note 312.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

HUNT v. ORWIG.

[17 B. MONROE, 73.]

DISTRICT COURT OF UNITED STATES HAS JURISDICTION TO RENDER JUDGMENT OF EVICTION against a remote vendor with notice of suit, and in favor of a remote vendee with special warranty. The vendor is concluded by judgment in such case.

VENDOR CANNOT, IN ACTION BETWEEN HIMSELF AND REMOTE VENDEE, impeach the consideration expressed in his deed to his immediate vendee in order to lessen the amount of recovery; nor can he in such action avail himself of fraud practiced upon him by his vendee.

IT IS NOT PLAINTIFF'S DUTY, IN ACTION OF EJECTMENT, to disclose the amount of purchase money paid for his title in order to limit his recovery, without being called upon to do so; and if the defendant does not show this fact, *prima facie*, the plaintiff has a right to recover the consideration in the deed of the vendor proportionate to the land lost.

DISTRICT COURT OF UNITED STATES HAS JURISDICTION WHERE IT IS SHOWN THAT PARTIES TO SUIT are citizens of different states, and that the amount in controversy exceeds five hundred dollars.

EJECTMENT. Andrew Hunt, by warranty deed, conveyed to one Collins three hundred and twenty acres of land in Illinois. The consideration, as expressed in the deed, was sixteen hundred dollars, but Hunt alleged that the true consideration was a tract of land in Ohio worth a much less sum. Collins conveyed the land, and one Orwig, through intermediate conveyances, became the owner. Orwig's tenant was sued in ejectment in the United States circuit court of Illinois, and judgment of eviction had for one hundred and twenty of the said three hundred and twenty acres of land. No eviction took place, but after judgment, Orwig purchased the superior title, his immediate vendor

conveying to him the three hundred and twenty acres with special warranty of title. Orwig then brought suit in equity against Hunt to recover damages for breach of warranty of the deed to Collins, and for the loss of the one hundred and twenty acres of land. Hunt's defense was chiefly that the consideration contained in the deed from him to Collins was not the true consideration, but that the real consideration was the conveyance to him by Collins of the tract of land in Ohio, and that Collins had grossly deceived him as to the quality and quantity of that land, and he showed facts tending to prove this defense. All evidence offered to show any other consideration than that expressed in the conveyance from Hunt to Collins was rejected by the circuit court, and judgment rendered against Hunt, from which he appeals.

Speed and Beaty, and C. G. Wintersmith, for the appellant.

W. L. Conklin and J. Harlan, for the appellee.

By Court, CRENSHAW, J. The objections to the jurisdiction of the court, and to the right of Orwig to maintain this suit as remote vendee, with special warranty only against Andrew Hunt as remote vendor, cannot avail for the reasons assigned and the authorities referred to by the circuit court. And that there was an eviction, or what is equivalent to an eviction, a recovery in the United States district court for the district of Illinois against Orwig, of part of the land sold by Hunt to Collins, is manifested by the record of that court; and we think no serious doubt can be entertained that Hunt had reasonable and sufficient notice of that suit before its trial to prepare for and defend the same, and that consequently he is concluded by the judgment in that case.

Hunt introduced evidence conducing to show that the consideration actually received by him was not that mentioned in his deed to Collins, which was a money consideration, but was a tract of land which Collins let him have of much less value than the sum stated in his deed to Collins as the consideration. He introduced evidence also conducing to show that Collins had by his misrepresentations deceived him as to the quantity and quality of the land received by him from Collins as the consideration of his deed to Collins. The circuit court refused to lessen the amount of recovery against Hunt in consequence of these facts, but determined that whatever might be the true rule in an action between a vendor and his immediate vendee, in which there would exist a privity of contract as well as of estate, Hunt could not, as between him and the remote vendee, Orwig,

impeach the consideration expressed in his deed to Collins, nor rely upon the alleged deceit practiced upon him by Collins. This opinion of the court, we apprehend, is correct.

In a recent case decided in New York, quoted by Sedgwick on the Measure of Damages, it was said: "It is well settled that for the purpose of ascertaining the damages to which a plaintiff may be entitled in an action at law for the breach of the covenant of seisin in a deed, the true consideration, and that all or any part remains unpaid, may be shown, notwithstanding a different consideration is expressed in the deed, and although it contains an acknowledgment on the part of the grantor that it has been paid at the time of or before the execution of the deed." The author, however, says: "But though parol proof may be admitted as between the original parties, it is well settled in New York that if the grantee has transferred the land, the consideration named is conclusive as between his assigns and the original grantor, at least as against the latter." The author proceeds, that Bronson, J., in the case of *Greenvaull v. Davis*, 4 Hill, 643-649, said: "It would work the grossest injustice to allow the covenantor to go into the question of how much was actually paid for the land when the title has failed in the hands of an assignee." It is further said in the case just cited: "The original parties knew, of course, what was the true consideration of the grant, but it is not so with third persons. They have no means of knowing what consideration was paid but from what the parties have said by the conveyance. The defendant covenanted with Price and his assigns. When he inserted the consideration and covenant in his deed he virtually said to any one who might afterwards come in as assignee, that he had received the whole five hundred dollars, and would stand bound to that extent that the title should not fail. The plaintiff acted upon that assurance and parted with his money, and the defendant should not now be heard to gainsay the admission. It is against good conscience and honest dealing to set up this defense, and the defendant is estopped from doing it."

Again: Bronson, J., in delivering his opinion in the case, referred to a case in which Justice Sutherland had delivered the opinion of the court, in which he used the following language: "If the covenant passes to the assignee with the land, it cannot be affected by the equities existing between the original parties any more than the title to the land itself;" that "to allow a secret agreement in opposition to the plain import of a covenant running with the land to control and annul it in

the hands of a *bona fide* assignee would be a fraud upon such assignee which the law will not tolerate."

We are not apprised of any principle of law in opposition to that recognized in the above authorities, so far as quoted, as to the rule which should govern the amount of recovery in an action by a remote grantee against his remote grantor upon his covenant of warranty. And we conclude, therefore, that the circuit court did not err in deciding that Hunt was concluded by the consideration mentioned in his deed to Collins in this action by a remote grantee, and that he could not avail himself of the alleged fraud practiced upon him by his vendee—that is a matter between themselves, and cannot operate against Orwig, the assignee of the land and warranty. The doctrine which prevails in ordinary assignments under our statute does not apply.

It is urged in argument that Orwig should not be allowed to recover more than he paid in purchasing in the paramount outstanding title, and that it was the duty of Orwig to disclose what he paid for this title. It does not appear what amount he paid for it, nor was he called upon to state, nor was it shown in any other way. If it were conceded that the plaintiff's recovery ought to be limited to the amount paid by him for the superior title, were that amount manifested, it cannot be so limited, as this amount is not made to appear. Nor do we perceive that it was the duty of the plaintiff to disclose the amount in order to limit his recovery without being called upon to do so. It was, as we take it, in the power of the defendant to show this fact, and he made no effort to do so. *Prima facie*, the plaintiff had a right to recover the consideration in the deed of Hunt proportionate to the land lost, and this is the amount decreed by the court.

As to the fraud charged, we think the testimony amply sufficient to sustain the charge.

We are also of opinion that the jurisdiction of the district court of the United States for the district of Illinois sufficiently appears in the action of ejectment in which the land was recovered against the plaintiff. It is true that it is a court of limited jurisdiction, and such a state of case should be shown in the record of the suit against the plaintiff in that court as to manifest its jurisdiction; and this we think has been done. The declaration alleges that the parties were citizens of different states, and that the amount in controversy exceeded the sum of five hundred dollars. This was sufficient to give that court jurisdiction.

Wherefore the decree is affirmed.

JURISDICTION OF CIRCUIT AND DISTRICT COURTS OF UNITED STATES: See *Voss v. Martin*, 50 Am. Dec. 750; *Reed v. Vaughan*, 55 Id. 133, and notes to these cases.

PRICE PAID BY PLAINTIFF FOR HIS INTEREST IN LAND cannot, in ejectment, be shown to affect his title: *Mott v. Clark*, 49 Am. Dec. 566.

HENDERSON & NASHVILLE RAILROAD COMPANY *v.* DICKERSON.

[17 B. MONROE, 173.]

RETROSPECTIVE LEGISLATION IS NOT PROHIBITED BY CONSTITUTION OF UNITED STATES NOR OF KENTUCKY, except in cases affecting or impairing the obligation of contracts.

WHERE NO CONTRACT EXISTS BETWEEN PARTIES, AMENDATORY ACT IS NOT EX POST FACTO LAW which gives either party three years in which to prosecute an appeal after an assessment of damages for a right of way is made.

EX POST FACTO LAWS relate exclusively to crimes.

RIGHT TO PROPERTY IS VESTED RIGHT, but a right to recover the amount of a judgment is not such right.

PARTY CANNOT BE DIVESTED OF VESTED RIGHT, UNDER CONSTITUTION OF KENTUCKY, until just compensation has been made him therefor, but the legislature has the power to prescribe the mode in which such compensation shall be ascertained and determined.

UNDER CONSTITUTION OF KENTUCKY, COMPENSATION SECURED TO OWNER OF LAND taken for a public use is the actual value to him in money of the land taken, considering its relative position to his other land and other circumstances which may diminish or enhance that value, and this value cannot be diminished by any speculative advantage he may derive from its appropriation to the public use.

PROVISION IN STATUTE IS VOID WHICH TENDS TO DEFEAT CLAUSE IN STATE CONSTITUTION securing to the owner just compensation for any of his property taken for a public use.

WHERE OWNER OF PROPERTY WHICH HAS BEEN TAKEN FOR PUBLIC USE CLAIMS MORE THAN ITS VALUE as consequential damages, the advantages and disadvantages which result to him from such taking may be compared by way of set-off, and if equal, he will not be entitled to such damages.

APPEAL from the circuit court of Todd county. The opinion states the case.

J. M. Harlan, for the appellants.

R. McKee, for the appellee.

By Court, *SIMPSON, J.* The appellee obtained a judgment against the appellants for the injury he had sustained by the passage through his land of the railroad which they were con-

structing. The appellants being dissatisfied with the judgment he had recovered against them brought the case to this court to reverse it. Their appeal was, however, dismissed, upon the ground that it was not authorized by their charter. Afterwards, by an act of the legislature passed at the session 1855-6, Sess. Acts, 67, the act incorporating the Henderson & Nashville Railroad Company was amended, as follows:

“When any assessment of damages for the right of way has been or shall hereafter be made, it shall be lawful for either of the parties, the person whose land has been condemned, or the said company, to prosecute and appeal to the court of appeals, at any time within three years from the time such assessment was made, for the correction of any errors that may have been made, to the prejudice of the party appealing.”

Since the passage of this amendatory act, the appellants have again brought the case to this court; and the counsel for the appellee contends that the amended act, so far as it is intended to operate retrospectively, is unconstitutional and void.

As a general principle, retrospective legislation is undoubtedly impolitic, but with the wisdom or policy of that part of the act under consideration which operates retrospectively we have no concern. The question that we have to decide is, whether that part of the act violates any of the provisions of the constitution of this state, or of the United States.

Retrospective legislation is not expressly prohibited by any of the provisions contained in either of the constitutions. Where it affects or impairs the obligation of a contract, it is prohibited; but it does not have that effect in this case, because there was no contract existing between the parties. It is not an *ex post facto* law, for such laws relate exclusively to offenses against the public, and not to private wrongs and injuries: *Calder v. Bull*, 3 Dallas, 386.

No constitutional provision has been designated as prohibiting this species of legislation. But it is said that at the time of the passage of the amendatory act the judgment appealed from was, by the laws then in force, final and conclusive, and that consequently the appellee had a vested right to the amount thereof, of which he has been deprived by the legislation in question, which must for that reason be deemed to be unconstitutional.

A vested right may be considered as the power to do certain actions, or to possess certain things lawfully. In its latter aspect it is substantially a right of property, and as such is

protected by those provisions in the constitution which apply to such rights. But a right to property is a perfect and exclusive right; and a right, therefore, to recover the amount of a judgment cannot be called a perfect or a vested right: *Calder v. Bull*, *supra*. The appellee has a vested right in his land. This right he cannot be divested of under the constitution until just compensation has been made him for it. The judgment which he obtained did not divest him of his right to his property, nor did it enlarge his rights, nor invest him with any additional ones. He could not have a vested right to the land and also to the amount of the judgment. A vested right to the latter, in the proper sense of the term, could not accrue until the money was collected. He has a constitutional right to have just compensation made him before he shall be deprived of his property; but the legislature has the power to prescribe the mode in which such compensation shall be ascertained and determined in a fair and just manner. The amendatory act under consideration did not violate nor impair any vested right, but only furnished to either party the same opportunity which other litigants had to correct any errors that may have been committed by the court below. We do not therefore regard the act as unconstitutional.

The constitution, article 13, section 14, declares that no man's property shall be taken or applied to public use without just compensation being previously made to him. And according to the construction given to this provision in the cases of *Sutton v. City of Louisville*, 5 Dana, 28, and *Rice v. Danville etc. T. R. Co.*, 7 Id. 81, the compensation secured to the owner is the actual value in money of the property taken from him, which cannot be diminished by any speculative advantage he may derive from its appropriation to the public use.

But the principal question in this case is, How shall this value be estimated? The road which the appellants are constructing will pass through the farm of the appellee in such a way as to separate his dwelling-house and a portion of his improvements from the residue of his tract, and by running nearly parallel with another public road, will leave between the two roads a long, narrow strip of land upon which his dwelling-house and part of his improvements are situated, whilst the balance of his improvements, and also of his tract of land, will be on the opposite side of the railroad. On the part of the railroad company, it is contended that the land thus taken for the use of the road, and being about ten acres, should be valued

without any reference to its relative position to the balance of the tract, but according to its real and intrinsic worth, independent of its connection with the residue of the land. On the other side, it is contended that in estimating its value its relative position to the balance of the tract, as well as to the improvements thereon, should be taken into consideration, and that no just or fair estimate of its value can be made upon any other principle.

The constitution secures to the owner of the land just compensation for his property before he can be deprived of it. Its value to him, considering its relative position to his other land, and the other circumstances which may diminish or enhance that value, can alone afford him a just compensation for its loss. To third persons, the same quantity of land of equal quality on one of the boundaries of the farm might be of as much value as if it were situated in the middle of the farm; but at the same time its value thus ascertained might be a very inadequate compensation to the owner if the land were taken out of the middle of his farm, so as to separate it into different parts, instead of being taken on one of its boundary lines. The real value of the land to the owner, as it is actually situated, and not merely its value regarding it as a separate and independent piece of land, he has a right to demand, and nothing less can secure him a just compensation for his property. In making such an estimate, however, the inquiry should not be, what price would induce him to sell the ten acres of land thus situated, because he might not be willing to sell it at any price; but the inquiry should rather be, what would be its value to him situated as it is, if he were not the owner of it, but owned the adjacent property on both sides of it, under the same circumstances precisely that now exist. Its actual value to him in that condition would be as much as he has a right to demand, and would afford him that just compensation for his property secured to him by the constitution.

The thirty-eighth section of the act of the legislature passed in 1851, 2 Sess. Acts, 1850-1, p. 297, under which the valuation in this case was made, provides that "the commissioners, in making the valuation, shall take into consideration the loss or damage which shall accrue to the owner or owners in consequence of the land or right of way being taken or surrendered, and also the benefit or advantage that the owner or owners may receive from the construction or establishment of the railroad, or any branch of it, or its works; and shall particularly state

the nature and value or amount of each; and the excess of the loss or damage over and above the benefit and advantage to the owner or owners shall form the measure of valuation of the said land or right of way."

But so far as the foregoing provision tends to defeat or render nugatory the clause in the constitution which secures to the owner a just compensation for any of his property that may be taken for public use, which compensation must be made in its actual value in money, and not in benefits and advantages which may be derived from the construction or establishment of the railroad, it is wholly inoperative, and must be disregarded.

If, however, the owner claims more than the value of the property taken, and seeks indemnity for consequential inconvenience or injury, then the advantages which result to him may be taken into consideration, and such advantages and disadvantages may be compared and set off, the one against the other; and if the advantages are equal to the disadvantages, then he will not be entitled to anything for such consequential inconvenience or injury.

In this case, however, the court instructed the jury who assessed the damages that they were not to take into consideration, in estimating the consequential damages which the owner might sustain, any advantage that he might derive from the construction of the road, unless it were a special individual benefit which was not common to others in the same neighborhood. In this exposition of the law we think that the court erred.

The advantages which the owner may derive from the construction of the road are not in the least diminished by the fact that they will be enjoyed by others, nor does it furnish any reason why they should be excluded from the estimate in comparing the advantages and disadvantages that will result to him from the establishment of the road. Other persons, it is true, may enjoy the same advantages without being subjected to the same inconvenience; but this results from the nature of the improvement itself, and does not in any degree detract from the value of these advantages to the owner of the land through which the road passes.

Wherefore, for the error of the court in giving the foregoing instruction, the judgment is reversed, and cause remanded for a new trial, and further proceedings consistent with this opinion.

RETROSPECTIVE ACT IS CONSTITUTIONAL IF IT NEITHER TAKE AWAY VESTED RIGHT in property nor impair the obligation of a contract: *Aldridge v. Tusculum C. & D. R. R. Co.*, 23 Am. Dec. 307; and as to the validity of retrospective acts, see *Bleakley v. Farmers' and Mechanics' Bank*, 17 Id. 635, and

note 637; *Wynne's Lessee v. Wynne*, 58 Id. 66; *Rawles v. Kennedy*, Id. 239; *Boston & Gunby v. Cummings*, 60 Id. 717, and notes to these cases, collecting prior decisions in this series.

EX POST FACTO LAWS RELATE TO CRIMES, AND NOT TO PRIVATE RIGHTS OR CIVIL REMEDIES: *Baughner v. Nelson*, 52 Am. Dec. 694; *Boston & Gunby v. Cummings*, 60 Id. 717, and notes to these cases.

VESTED RIGHT IS POWER ONE HAS TO DO CERTAIN ACTIONS OF TO POSSESS certain things according to the laws of the land: *Bailey v. Philadelphia etc. R. R. Co.*, 44 Am. Dec. 593.

LEGISLATURE MAY PRESCRIBE MODE OF ASCERTAINING AMOUNT OF COMPENSATION to be made where private property is taken for a public use, if the constitution is silent on that point: *Beekman v. Saratoga etc. R. R. Co.*, 22 Am. Dec. 679, and note on "Eminent Domain," 686 et seq.; *Livingston v. Mayor etc. of New York*, Id. 623, note 634; *Ex parte Martin*, 58 Id. 321, and note 332, collecting prior cases.

AMOUNT OF COMPENSATION WHICH MUST BE MADE for lands taken for a public use: See *Bloodgood v. Mohawk & Hudson R. R. Co.*, 31 Am. Dec. 313, and extensive note thereto 372 et seq.; *Moale v. Mayor etc. of Baltimore*, 61 Id. 276, and note 282, collecting prior cases.

ARTICLES OF STATE CONSTITUTION GUARANTEEING TO CITIZEN RIGHT OF ACQUIRING, POSSESSING, AND PROTECTING PROPERTY necessarily imply a prohibition upon the legislature from taking private property for a public use without providing just compensation to be first made to the owner: *Ex parte Martin*, 58 Am. Dec. 321, and note 332; see also *Bailey v. Philadelphia etc. R. R. Co.*, 44 Id. 593; *Boston & Gunby v. Cummings*, 60 Id. 717; *Moale v. City of Baltimore*, 61 Id. 276, and note 283.

RESULTING BENEFITS MAY BE OFFSET AGAINST VALUE OF PROPERTY TAKEN FOR PUBLIC USE in the exercise of the right of eminent domain: *Symonds v. Cincinnati*, 44 Am. Dec. 529, and extended note thereto 532 et seq., citing the principal case; and see also, on same subject, *Livingston v. Mayor etc. of New York*, 22 Id. 622; *Nichols v. City of Bridgeport*, 60 Id. 636, and note 648.

THE PRINCIPAL CASE IS CITED in the following cases, to the point that the constitution of Kentucky secures to the owner of land taken for a public use just compensation for his property before he can be deprived of it, and in estimating the value of the property taken its value to him, considering its relative position to his other land, and any other circumstances which may diminish or enhance that value can alone afford him just compensation for its loss: *Robb v. Maysville etc. Turnpike Co.*, 3 Metc. (Ky.) 120; *Elizabethtown etc. R. R. Co. v. Helm's Heirs*, 8 Bush, 683; but in estimating damages beyond the value of the land taken, consideration must be had for the benefits derived by the owner from the taking of the property: *Louisville & Nashville R. R. Co. v. Thompson*, 18 B. Mon. 744.

MORRISON v. THURMAN.

[17 B. MONROE, 249.]

WHERE CALAMITY OF ONE PERSON, PRODUCED WITHOUT HIS FAULT OF BY mere misjudgment or indiscretion in the exercise of a right, causes an injury to the rights of another, the latter can maintain no action except for the unnecessary continuance of the injury, and is limited to a recovery for actual damage produced by that wrong.

NAVIGATOR MAY MOOR HIS VESSEL TO TREE UPON VACANT SHORE without being deemed guilty of a wrong, though done for convenience only, and not to avoid impending danger; and under circumstances of danger incident to navigation, he may moor his vessel to a private shore, using such caution to avoid injury to others as circumstances will allow, and being responsible only for such damage as may arise to another from his own positive acts or from want of proper skill or care.

NAVIGABLE RIVER, AT EVERY STAGE OF WATER, IS FREE TO PUBLIC FOR PURPOSES OF NAVIGATION and its incidents; and the owners of land along its banks can acquire no right to the use of the river inconsistent with the public right.

CASUALTY IN NAVIGATING VESSEL NOT EXPECTED, AND FOR WHICH NO BLAME IS ATTRIBUTABLE TO PARTY OR HIS AGENT, is neither cause of action for damages nor ground for enhancing damages for an entry on another's land; and in such case, damages can be recovered only for subsequent loss after the obstruction which caused the accident might have been removed by the use of ordinary care.

APPEAL from the circuit court of Jefferson county. The opinion states the case.

James Speed, for the appellants.

The appellees were not represented by counsel.

By Court, MARSHALL, C. J. This case having formerly come before the court on an appeal from a judgment against the plaintiffs, on a demurrer to the petition, which was adjudged to be insufficient by the circuit court, the opinion of this court had reference only to the facts as presented in the petition. And although these facts rendered it necessary to discuss and decide several questions applying to the rights of riparian owners on the one side, and of navigators of the stream on the other, there was no attempt to apply the principles evolved to any other state of case than that which was presented by the petition, which, in the opinion of this court, made out a good cause of action.

The facts thus presented were that the plaintiffs, being rightfully in possession of a portion of the shore and bank of the Ohio river, had appropriated their shore to the uses of their saw-mill on the top of the bank, and for a landing, at which logs were received to be taken to the mill for sawing, and had constructed, from the mill into the river, log-ways, along which, by the aid of machinery, the logs were taken from the water's edge to the mill; and that the defendants had landed two heavily laden coal-boats at the shore of the plaintiffs thus appropriated, and of which the appropriation and use were, as the court assumed, indicated by the log-ways; that the boats lay across and over the foot of the log-ways extending into the river, and

thus obstructed the use of them; and that after warning to the defendants the boats were still continued in the same position, until, by reason of carelessness and mismanagement and of the want of sufficient crews to take care of the boats, they sunk, and thus continued, and in fact increased, the obstruction to the use by the plaintiffs of their shore and log-ways and of their mill; and that the defendants, though requested and promising to remove the sunken boats, failed to do so in reasonable time, or to use proper diligence for that purpose.

The court decided that the appropriation and use of the shore by the plaintiffs, as indicated by the facts, being, so far as appeared, no impediment to the public right of navigation, was lawful; that the navigator has no right at his pleasure to land upon the adjacent banks the property of private individuals for such purposes and for such time as he may choose, and no right wantonly to obstruct the riparian owner in the use of the adjacent river and bank for such useful purposes as are not detrimental to the public right; and that the defendants had no right unnecessarily to land their boats at the bank and landing of the plaintiffs, thus appropriated by them, and no right to lay their boats across the log-ways of the plaintiffs, nor even at the foot of them, whether above or below low-water mark, so as to obstruct the use of them; and that if their acts might at first be justified by necessity or excused by ignorance, the continuation of them after warning was itself a wrong, injurious to the rights of the plaintiffs, and aggravated by being prolonged by the sinking of the boats. The conclusion was, that, upon the face of the petition, these injuries being without excuse, and having produced damage to the plaintiffs, constituted a cause of action and ground of recovery: See *Thurman v. Morrison*, 14 B. Mon. 367.

It will be seen that in the former opinion the court did not undertake to define affirmatively the rights which the navigator has with reference to the banks of a public navigable river, but rather to define, with reference to the facts of this case, the rights of the riparian owner, and to notice the acts of the navigator inconsistent with those rights, and which, being without excuse and productive of actual loss or damage, constituted a cause of action. It is implied, however, that necessity might justify or ignorance excuse the landing of the boats at the plaintiffs' shore, and the laying of them across his log-ways. And it must be understood that although the continuation of these acts after warning could not be excused on the ground of ignorance, it might be justified on the ground of necessity. It is to be

observed, too, that the sinking of the boat, though attributed in the petition to the fault and mismanagement of the defendants, and charged to have increased as well as prolonged the obstruction, is spoken of merely as aggravating the wrong of not removing them after warning. The effect of failing to remove the sunken boats with reasonable dispatch is not particularly noticed. But even if the defendants were innocent of fault up to the time of the sinking of their boats, it was their duty, if they knew that they obstructed the plaintiffs in the use of their log-ways and landing, either to abandon the boats and their cargoes as soon as it was in their power to make the election, giving notice to the plaintiffs, or to remove the obstruction with reasonable diligence and dispatch; being responsible in the last case for nothing more than for the actual loss accruing to the plaintiffs by the continuance of the obstruction beyond the period reasonably necessary for its removal in the manner ordinarily used in such cases, and by means within the power of the defendants. The petition states a failure in this respect, and a consequent loss or damage to the plaintiffs, which, even if the defendants were chargeable with no previous fault, would render them liable to an action.

But where the calamity of one person, produced without his fault, causes an injury to the rights of another, the latter can maintain no action except for the unnecessary continuance of the injury by the wrongful act or neglect of the former. And even where the calamity which produces the injury is caused by mere misjudgment or indiscretion in the exercise of a right, the action should be regarded as one *stricti juris*, founded on actual wrong, and limited to a recovery for actual damage produced by that wrong. It would seem unreasonable to deny that the exigencies of navigation may be such as to justify, to a certain extent, such use of the banks of a public navigable river, though they be private property, as would, under ordinary circumstances, be a trespass on the close of the owner. But it is difficult to state in precise terms the nature of the exigencies which may constitute this justification, or the extent to which the rights of individual property may be overborne by them. Necessity, which is at once a sufficient cause and a proper limit of the justification, though in the strictest sense it admits of no alternative but that which is absolutely essential to the end in view, and without which it could not exist or be obtained, is a word which, in its ordinary use, admits of far greater latitude, embracing, according to the circumstances of the case, various

degrees of urgency, and even of convenience. And in determining whether an act which, abstractly considered, would be an invasion of the legal rights of another is or is not justified by any existing necessity, not only the circumstances under which it is done and by which it is induced, but also the nature and extent of the injury or damage involved in and following from it, as well as the care, or want of care, with which it is done, must be taken into view.

Where the injury is slight, and merely ideal or legal, unaccompanied by actual damage, as the mere entry upon the close of another, a slight necessity, amounting only to convenience, being sufficient to repel any inference of wanton or willful injury, if it be not a justification in law, is at least an excuse, which, upon common principles of humanity and comity, gives immunity to that which in contemplation of law may be a wrong. The traveler, whether on foot or on horseback, or in a carriage, who finds the public highway impassable, is justified by necessity in passing through the inclosed grounds of the neighboring proprietor.

But the same condition of the road which might justify or excuse the foot-passenger in thus using or passing upon the soil of another might neither justify nor excuse such an invasion of private property by persons traveling with horses and carriages. A navigator who makes fast his boat to a tree upon a woodland shore can hardly be deemed guilty of a wrong, though it be done for some purpose of convenience only, and not to avoid impending danger. And certainly he has a right, in circumstances of difficulty and danger incident to the navigation in which he is engaged, to provide for the safety of his vessel by mooring it at any vacant part of the shore, using as much caution to avoid injury to others as circumstances will allow, and being responsible for any actual damage which may arise to another from his own positive acts, or from his want of proper skill or care. We are to be understood as using the word "justification" or "excuse" in a sense which does not affect this responsibility. And although, in the exercise of this right, founded in necessity, the navigator may have fastened his vessel to a private shore, and laid her upon a part of the river commonly used by the riparian proprietor, yet, if in this use of the shore, which is private property, and of the river, of which he has the right to use for the purposes and incidents of navigation every part not in the actual occupation and use of some one else, he has done nothing more than was reasonably neces-

nary for the safety of his vessel, and has committed no actual present damage to the property of the riparian proprietor, and has not interfered with his actual use and enjoyment of it, nor interrupted his current actual use, at the time, of the adjacent portion of the river ordinarily occupied for his own purposes, the navigator is thus far innocent of blame, and so long as the position of his boat, assumed from necessity, is retained under a similar necessity, he continues to be equally blameless, unless upon being apprised that the boat, in the position which he has placed it, actually prevents or obstructs the appropriate use of the shore and adjacent river by the riparian owner, or that its continuance in that position will do so, he wrongfully neglects to remove it when he could do it by ordinary exertion and without unreasonably exposing the vessel to increased danger.

The justice of these principles, in the terms in which they have been stated, would probably not be denied. But it is apparent from the examples which have been given that these terms are too indefinite to form a precise rule, and that in the application of the principles to particular cases much must be left to the discretion of those who are to decide. That discretion cannot be justly exercised but upon a calm consideration of all the facts, with a view to the question whether the acts or conduct of the navigator of which complaint is made were justified by an existing necessity, and whether he has used such caution and such exertion to avoid injury to others, as under the circumstances a due regard to their rights and interest required. And these questions resolve themselves practically into the inquiry, whether he has done what other navigators engaged in similar business and possessing competent experience and ordinary skill and discretion would or might have done, or would deem proper to be done, in the same circumstances. This criterion, subject to the judgment and discretion of those who are to decide the question of responsibility, is the nearest and most precise test which we can suggest for determining, not whether the navigator is to be held responsible for actual damage done to riparian property, caused either necessarily or by negligence in the effort to save his vessel, but whether he is to be regarded as a mere wrong-doer, who, having invaded the property of others without excuse, is responsible for all the consequences of his wrong, though caused or enhanced by superhuman agency acting upon his boat in the situation in which he improperly placed it, or whether, having acted with reasonable discretion, skill, and diligence in placing his boat in that position, and in continuing

her there until by inevitable casualty she was sunk, he is to be held no further liable for all that occurred before the sinking of the boat than if, instead of being sunk, it had then been moved on in the prosecution of its voyage, and to be liable afterwards only for the actual damage caused by the sunken boat after the wreck and cargo might, by the use of ordinary diligence, have been so removed as to cause no damage.

The statements of the petition, if true, would show that the sinking of the boats in this case was attributable to the neglect, mismanagement, and insufficiency of the crews, and therefore it was regarded in the former opinion as an aggravation of the wrong assumed upon the statements of the petition to have been previously committed. But the answer denies, and the evidence disproves, the statements of the petition on this subject; and upon the case as now presented, the conclusion is authorized that such reasonable precautions and exertions as the circumstances seemed to require were in fact used to prevent the catastrophe. Whether this was in fact done was a question to be decided by the jury, with such aid from the opinions of men experienced in the management of boats of this sort under similar circumstances as the evidence before them might furnish. And the question being one on which the extent of the subsequent duty and liability of the defendants might depend, it should have been placed distinctly before the jury, with the advice (which in principle is applicable generally to the acts and course of the defendants) that even if the boats might possibly have been saved from sinking by the use of other means than those which were adopted, yet if the precautions and exertions actually used were such as might reasonably be deemed sufficient, and were deemed to be so by the persons having charge of the boats, their being sunk notwithstanding the use of such means is to be attributed to inevitable casualty, and not to the fault of the navigators.

Assuming that this casualty was not caused by the neglect or fault of the defendants, then, unless by their previous conduct they had made themselves liable for all consequences which might ensue from the position in which they had placed their boats in reference to the property of the plaintiffs, they were only bound to use ordinary diligence in removing the obstruction to the rights of the plaintiffs caused by the sunken boats, and were only liable under that responsibility for the loss or damage caused by the continuance of the obstruction after it might have been so removed. It remains, then, to inquire whether they had by their previous conduct made themselves

liable to a greater extent than this for the consequences of the disaster; or rather, to consider with reference to the facts the principles to be applied in the determination of this question.

The boats had been brought from a coal region above, and were destined for a market below the falls of the Ohio, which were to be passed by means of the Louisville canal. They were in charge of a pilot of twenty years' experience in the management of coal and flat boats. Arriving in the night near the head of the canal, they were landed at Porter's landing, just below the leasehold property of the plaintiffs. On the next day the canal, being occupied by steamboats, and the wind being too high for these flat-boats to proceed on their voyage, they were not moved from Porter's landing, where they remained for two or three days in consequence of the continued high wind, which still prevented their proceeding on their voyage. On the third day it had turned very cold, and ice began to be formed in the river, and the manager of these boats, considering them to be in an unsafe position in consequence of their sides being exposed to the current by reason of the position of other boats at the same landing, determined, for reasons which he states, to move them a short distance up instead of down the stream; which was done by cordeling. He says his intention was to have moved them above the log-way, and perhaps the ground, of the plaintiffs, but he was prevented by ice and sunken logs from doing so; and he fastened them to the plaintiffs' shore by lines, the boats being in the river partly over or at the foot of the log-way. In this situation they seemed to have been detained by the ice until it broke up, when notwithstanding the effort by means of spars to keep the bows up stream to meet the current and the ice, the spars were broken, the bows forced in towards the shore, and the sides yielding to the force of the ice and current, the boats immediately sunk.

The assistant manager and conductor of the boats, also an experienced navigator, make substantially the same statements of facts and opinions, and there is no contradiction, except that some witnesses are of opinion that when the boats were moved up to the shore of the plaintiffs they might have been taken to a place of equal safety without interfering with the rights of the plaintiffs. But they show that it would have been extremely difficult, if not impossible, to find a place of real safety. If we are to judge from the event, the boats might as well have remained at Porter's landing, where they could not have met

a worse fate than that which actually befell them. And we suppose if they had been sunk there they would not have interfered with the log-way of plaintiffs. But this is not the proper test of the duties or liabilities of the defendants, whose agents, if they have even judged erroneously as to what was most expedient, do not appear to have acted with any other view than that of preserving their boats, nor under any other motive than that of avoiding danger. They were not looking out for a place in which their boats might be sunk with the least possible injury to others, but for a place in which they might, and, as was hoped, would with reasonable care, be safe from the expected danger. And the question is not whether they acted under an imperious necessity, nor whether, under circumstances admitting a choice of alternatives, they adopted that which, in view of all the facts, may now be considered as the wisest; but whether, under the existing circumstances, the tying of the boats to the private shore or landing of the plaintiffs, where they lay on the water over or at the foot of the log-way, was at most anything more than a violation of the close of the plaintiffs under a necessity, which, if it did not justify or excuse, at least so far mitigated the wrong as to exempt the defendants from liability for consequential damage not arising directly from this act nor from any further act or neglect of themselves or their agents.

The plaintiffs have no right to question the propriety of moving the boats up instead of down the river from Porter's landing, unless they show that it was done with a view to injure them. If, as the manager of the boats says, their removal to a place above the log-way was impeded and prevented by sunken logs, belonging presumably to the plaintiffs, they have little right to complain that the boats were stopped at a point beyond which their progress was prevented by obstructions which the plaintiffs themselves had placed in the river. And if, there being no such obstructions, the position of the boats was chosen with a view to convenience and safety, under circumstances rendering it necessary that they should be fastened to the shore, of which there seems to be no doubt, there is no proof that the plaintiffs were actually using their log-way at the time, or that they were prevented from or obstructed in any intended or practicable use of them at any time before the sinking of the boats. The state of the weather and of the river authorizes the inference that if the boats had not been there the plaintiffs would not, and could not, have used it, from the time when the

boats were placed there until they were sunk by the ice; and that even then they caused no obstruction to the use of the log-way until the river had fallen so that logs could not be floated over the boats.

If this be so, the position of the boats until they sunk caused no actual or immediate damage or loss to the plaintiffs, was no encroachment upon their soil, nor any invasion of their rights, and cannot in itself be deemed a wrong to them which would make the defendants liable for the damage caused by the sinking of the boats. And this is true whether they sank above or below low-water mark. For although the soil between high and low water mark may have been the close of the plaintiffs, the river itself, at every stage of water, was free to the public for navigation and its incidents, and every part not actually occupied at the time was for these purposes open to the occupation of any individual. The plaintiffs themselves, although they were entitled to the exclusive use of their log-way, and although they may have endeavored to secure to themselves the exclusive use of the adjacent river, could acquire no right to use the river inconsistent with the public right, and could appropriate it to their own exclusive purposes only by actual use, and no longer than that use should continue. But as their use of the river for the purpose of supplying logs for their mill is not necessarily inconsistent with the common right, and may be regarded as a part of it, the obstruction of that use, except in the exercise of the common right of navigation and its incidents, would be an injury to them for which they might have an action. No part of the river belonged to them except while they were actually using it, and the occupation of any part of it, however near to their log-way, and though its actual use might be thereby obstructed, with consequent loss or damage, would be no injury to them if it occurred in the lawful exercise of the common right or its incidents. And if it occurred otherwise, and even wantonly, it would be no injury unless it interrupted the actual or intended and otherwise practicable use of the log-way or the adjacent river. In the first case, there would be damage without injury; in the last case, there would be no injury, because there would be no damage.

So long, therefore, as the boats were afloat in the river, and until after they were sunk, their position in the river, though directly over or at the foot of the log-way, was not an injury or wrong to the plaintiffs; and if they might have maintained an action for entering upon their shore and tying a cable there,

they could have recovered nothing on account of the position of the boats. Being placed there for safety, with no anticipation of their sinking there, the possibility of that event, and of consequent injury which might or not have followed from it, never could have been either a cause of action, or a ground for enhancing the damages, if any, recoverable for the entry on the plaintiffs' land. The fact that by a casualty not expected, and for which no blame is attributable to the defendants or their agents, the boats were afterwards sunk, causing ultimate inconvenience and damage to the plaintiffs, cannot have a retroactive operation either to make the previous position of the boats an injury to the rights of the plaintiffs, or to enhance the injury, if it be one, of having entered upon the plaintiffs' close and used it for making and keeping the boats fast to the shore. This injury to the close being in itself but trivial, amounting at most to a violation of legal right, attended neither with actual damage to the close, nor any circumstance of aggravation, it may be excused by a slight necessity arising in the legitimate course of navigation. And as it should not be enhanced by the retroactive operation of the damage caused by the subsequent calamity, so neither should it have a prospective operation to change the calamity itself into a wrong. If the boats had not been sunk by the ice, but had proceeded on their voyage when the river became clear, the plaintiffs would have sustained no actual damage from the occupation of the river in front of their log-way while it could not have been used on account of the cold weather and ice, and but little even if it might have been used for a day or two notwithstanding these causes; and no damage was in fact done to the close itself by fastening the boats to it and keeping them there. And comparing, upon the facts now appearing, the nature of the injury and its probable consequences at the time with the circumstances under which the managers of the boats sought this place of refuge for them, and fastened them to the shore, we think the acts are fairly attributable to the exigencies of navigation, which though they may not exempt the defendants from making compensation for their use of another's property, and for any actual damage caused thereby, excuses them from all further responsibility.

The defendants do not deny that they knew of the existence of the plaintiffs' log-way, and understood the purpose for which it was intended and the use to be made of the adjacent river, but they deny that they were warned to remove their boats from the position in which they had been placed. And although it

is proved by one of the laborers of the plaintiffs that he, acting under their general direction to keep off boats from the front of their landing and log-way, warned some of the hands on these boats to remove them soon after he first saw them, he also states that they denied his authority to require such removal; and it does not appear that the managers or commanders of the boats ever knew of this requirement, or that it was ever repeated to them, or even to the ordinary hands. And as the warning seems to have referred only to the situation of the boats with respect to the log-way, the inference is that it was made in the assertion of a right to the adjacent river which did not exist except while it was in use. And the failure to repeat the requirement in a more formal manner to the managers of the boats, which retained their position for several weeks before they sunk, tends not only to confirm the inference that they did not during that period obstruct the actual use of the log-way nor produce any real inconvenience or damage, but also to prove that the plaintiffs, aware of the necessity which had brought them into that situation, acquiesced in it, and would have made no complaint if, instead of being sunk, they had gone away when the ice broke up, and as soon as their log-way might have been used.

If, as we have assumed, the position of the boats caused no actual damage to the plaintiffs before they were sunk, or was such as the exigencies of the case justified or excused, the plaintiffs were entitled to recover nothing for the technical breach of their close; nothing for the use of their landing, except such wharfage as they may have had a right to charge; nothing for the position of the boats in front of their log-way, unless they obstructed, without reasonable necessity, the actual use which would otherwise have been made of it; and if there was no unjustifiable or unnecessary obstruction to such use before the boats were sunk, and if the sinking was not attributable to the fault of the defendants, the plaintiffs had no right to recover for any subsequent loss or damage occasioned thereby, except for the actual obstruction to the use of their log-way, and the consequent loss or damage to themselves after the obstruction might have been removed by the use of ordinary diligence. It is, indeed, contended that the plaintiffs ought not to recover for any loss to themselves occasioned by the calamity sustained by the defendants without fault on their part, and that if they suffered inconvenience from the sunken boats they might and should have removed them. But the principles just laid down

do exempt the defendants from liability for the damage to the plaintiffs necessarily consequent upon the calamity of the defendants, who are only made responsible for improper delay in removing the obstruction, which for their own benefit they undertook to remove. And although the plaintiffs might have removed it themselves, for and at the charge of the defendants, or might have aided them in doing it, they were not bound to assume a burden which the defendants undertook for themselves; and their failure to co-operate, though it may tend to show that they were suffering no intolerable grievance from the obstruction, does not impair their right to recover for the loss actually sustained by reason of the negligence of the defendants in performing the duty which they had undertaken.

The instructions given to the jury, though based substantially upon the principles of the former opinion, seem not to have made the discriminations which, according to the principles of this opinion, the circumstances detailed in evidence required, and upon which the right and extent of the recovery should have been made to depend. The verdict rendered under these instructions is, therefore, not to be relied on as doing justice between the parties, and a new trial should have been awarded.

Wherefore the judgment is reversed, and the cause remanded for a new trial in conformity with the principles of this and the former opinion.

RESPONSIBILITY FOR INJURIES OCCASIONED BY ACCIDENT: See note to *Vincent v. Stinchow*, 29 Am. Dec. 149; and no action lies for injury occurring in prosecution of a lawful act, where it results from an inevitable accident, without any blame or default on defendant's part: *Miller v. Martin*, 57 Id. 242; to same effect, see *Williams v. Michigan Central R. R. Co.*, 55 Id. 59.

RIGHT TO USE OF NAVIGABLE STREAM IS IN PEOPLE succeeding to the rights of the crown: *Attorney General v. Stevens*, 22 Am. Dec. 526; and the right to navigation in a navigable river is superior to all other rights: *Lansing v. Smith*, 21 Id. 89, and note 101; *Moor v. Veasie*, 52 Id. 655, and note 660, collecting prior cases; *Moore v. Sanborne*, 59 Id. 209, note 220.

LEXINGTON LIFE, FIRE, AND MARINE INSURANCE Co. v. PAGE & RICHARDSON.

[17 B. MONROE, 412.]

WHERE CAPITAL OF CORPORATION CONSISTS IN AMOUNT PAID FOR STOCK therein by the shareholders, any money advanced by them beyond what is due on their stock becomes a debt against the corporation.

SHAREHOLDERS HAVE AS MUCH RIGHT TO CONTRACT WITH CORPORATION as if they were strangers.

SHAREHOLDER WHO IS CREDITOR OF CORPORATION may be preferred in an assignment made by it, and no inference of a fraudulent intent can be deduced therefrom.

DIVIDENDS DECLARED FROM PROFITS on premiums on unexpired risks are subject to reclamation by the corporation.

DEED OF ASSIGNMENT TRANSFERRING "ALL PROPERTY OF EVERY DESCRIPTION, REAL, PERSONAL, MIXED, OR CHOSE IN ACTION, in whose-soever hands the same may be found," is sufficient to pass reclaimable dividends, and vests them in the trustee for the benefit of the *cestuis que trust*.

EXPRESS AND CONTINUING TRUSTS ARE WITHIN EXCLUSIVE JURISDICTION of courts of equity, and are not affected by the statute of limitations.

IMPLIED TRUSTS ARE COGNIZABLE IN COURTS OF LAW, and are not exempted from the operation of the statute of limitations.

WHERE RIGHT OF ACTION IS IN CORPORATION, and the statute of limitations is a complete bar against it, the bar is also complete against the creditors of the corporation.

WILLFUL IGNORANCE, OR THAT WHICH RESULTS FROM NEGLIGENCE and want of that degree of vigilance which the law requires, will not prevent the operation of the statute of limitations.

WHERE PARTY HAS ADEQUATE REMEDY AT LAW, courts of equity will not entertain jurisdiction.

WHERE THERE IS REMEDY BOTH AT LAW AND IN EQUITY, STATUTE OF LIMITATIONS APPLIES EQUALLY TO BOTH.

BENEFICIARIES UNDER TRUST DEED MAY MAINTAIN ACTION FOR ENFORCEMENT OF TRUST and the recovery of that portion of the trust funds to which they may be entitled.

APPEAL from the circuit court of Fayette county. The opinion states the case.

W. A. Dudley, George Robertson, and M. C. Johnson, for the appellants.

H. C. Pindell, for the appellees.

By Court, **SIMPSON, J.** On the first of November, 1851, the Lexington Fire, Life, and Marine Insurance Company made an assignment of the whole of its effects to R. A. Buckner, in trust, to pay off the debts of the company according to the order therein specified.

In the spring of 1849, and previous to that time, the company had declared several semi-annual dividends of what was deemed by the board of directors to be its profits, some of which dividends were credited upon the notes which had been executed by the stockholders for the payment of their stock subscriptions.

This action was brought by Page & Richardson, who claim to be the creditors of the company, for advances made by them in the payment of losses, and for their commissions in acting as the agents of the company.

The plaintiffs, in their petition, presented their claim to relief in a double aspect. They attempted to impeach the validity of the assignment to Buckner on the ground of fraud; but if the deed be valid, they prayed that they might have the benefit of its provisions so far as they would operate in their favor. They also charged that the dividends which had been declared by the company were illegal, having been made when in fact there were no profits to divide; and prayed that the stockholders might be compelled to refund enough thereof to pay their demand, unless the right to reclaim them had passed to the trustee; in which event, they prayed that he might be required to collect them and account for them as part of the assets of the trust. The insurance company, Buckner, the assignee, and the individual directors and stockholders who declared and received the dividends, were all made defendants to the petition.

By an amended petition, the plaintiffs alleged that they had not discovered the illegality of the dividends until within five years next preceding the commencement of the action. The defendants filed separate demurrers. The president, directors, and trustee also answered and denied that the deed of trust was fraudulent. The trustee insisted that the right to reclaim these dividends passed to him by force of the assignment. The stockholders denied the illegality of the dividends, and set up the following grounds of defense in the event that they should be adjudged to have been illegally declared. They relied upon the statute of limitations; presented various demands against the company for which they claimed credit by way of set-off, and denied that the plaintiffs were in a position to entitle them to a judgment against them, inasmuch as a court of equity had no jurisdiction upon the allegations contained in the petition.

The circuit court overruled the demurrer; adjudged that the assignment was valid; that the dividends were illegal; that the right to reclaim them did not pass to the trustee; that the statute of limitations was no bar to their recovery; and that the court had jurisdiction to subject them directly to the payment of the plaintiffs' demand; but that the stockholders had a right to retain out of the dividends any demands they had acquired against the company before this action was instituted. From this judgment the defendants have appealed, and the plaintiffs have prayed a cross-appeal.

The validity of the assignment to Buckner is the first question that we will consider. The extrinsic evidence of fraud is so very slight, and is so far from sustaining the charge, that we do not

deem it necessary to make any further reference to it. Indeed, the principal objection made to the assignment is that it furnishes on its face, as is contended, intrinsic evidence of a fraudulent intent.

Previous to the execution of the deed of trust to Buckner, many of the stockholders had advanced to the company, either in money or negotiable paper, twenty-five per cent on the amount of their stock, to enable it to continue its business. The advancements thus made were treated as debts by the company; their payment was secured in the deed of trust, and precedence given to them over numerous other demands held by other creditors. It is contended that these advancements were made by the stockholders as such, and should not have been considered as debts due by the company, but as part of the capital advanced by the stockholders, on which the company was to operate for their benefit. And further, that the stockholders were in reality trustees, and having in the management of the trust previously converted to their own use a larger amount of the trust funds than the sums advanced by them, that under these circumstances the deed of trust made to secure the repayment of these advancements was fraudulent and illegal.

This argument is fallacious in several of its assumptions. The capital of the company consisted in the amount paid for stock by the shareholders, and any money which they advanced to it, beyond that which was due on their stock, became in reality a debt. Although called an advancement, it was substantially a loan, and was so regarded by the parties. And as it was made to enable the company to pay off debts which it had incurred, so that it might sustain its credit and carry on its business, it constituted a debt as meritorious in every respect as any other demand against the company. The stockholders, instead of being trustees, were substantially the *cestuis que trust*. They furnished the capital which was to be used and managed by the board of directors for their benefit and advantage. They were not trustees in any sense of the term. Individually, they had as much right to deal with the company as third persons. They could contract with and sue the company, and in all other respects deal with it as if they were strangers. The board of directors did not derive its authority from them, nor act, properly speaking, as their agent. Its powers were derived from the charter of the corporation, and were wholly independent of the action of the stockholders. The stockholders were members

of the corporation, but its business was conducted by instrumentalities created by the charter, and its powers were derived from the same instrument, and not from the corporators.

If the corporation had an available claim against the stockholders for illegal dividends which they had received, still, as that claim was not asserted, nor its existence even recognized at the time of the assignment, it was not fraudulent to secure to them the payment of the money which they had advanced, and which was an existing and acknowledged liability. No inference of a fraudulent intent can be deduced therefrom, nor does it subject the assignment to any suspicion of unfairness, any more than such a preference would have done had no such claim against the stockholders existed on the part of the corporation. The demands were wholly independent of each other, and therefore there was no such connection between them as rendered it necessary in securing the one to refer to the other, even had its existence been known at the time. Consequently the conveyance to the trustee must be deemed legal and valid.

The next question that properly presents itself for consideration is that which involves the legality or illegality of the dividends which were made by the board of directors. By the seventh section of the charter by which the company was incorporated it was enacted "that it shall be the duty of the president and directors, on the first Mondays of May and November in each and every year, to make a dividend of so much of the profits of said corporation as to them, or a majority of them, shall appear advisable."

The board of directors, in making the dividends in question, considered as profits the premiums on unexpired risks, and unless this was proper, the dividends which were made were not authorized by the charter, inasmuch as, independent of these premiums, the means of the corporation, over and above its liabilities, were insufficient for their payment. We think it is very evident that these premiums could not be properly regarded as profits. Only so much thereof as might remain after paying the amount of such losses as should occur would in reality constitute the actual profits on the insurances upon which they had been paid. This was the decision of the court in the cases of *De Peyster v. American Fire Ins. Co.*, 6 Paige, 486, and in *Scott v. Eagle Fire Co.*, 7 Id. 198, which were cases very similar to the present one. We cannot, indeed, very well perceive any plausible ground on which this position can be controverted. The losses must in every case be deducted before the profits,

in any kind of business whatever, can be ascertained. This proposition is so self-evident that argument to sustain or illustrate it is wholly unnecessary.

So much of these premiums might possibly have been regarded as profits as the previous business of the company, for a series of years, would have demonstrated could be safely considered as a surplus that would remain after all losses were paid; but upon no imaginable hypothesis could it be right or admissible to treat the whole amount of premiums, which resulted from risks that were still pending, as actual profits. The most safe, and indeed only allowable, principle to act upon in such cases would be to exclude from the computation of profits altogether all such unearned premiums. Excluding such premiums, some of the dividends were made when there were no profits on hand to divide among the stockholders, and such dividends were obviously unauthorized and illegal. It is, however, difficult to determine, either from the commissioners' report, or any evidence in the cause, which of the dividends should be regarded as subject to reclamation. It is necessary to a correct decision of this question that the condition of the company at the time each one of the dividends was made should appear. Two dividends might be made without there being on hand a sufficiency of profits to have authorized either at the time they were respectively declared, and still the last one might have been proper if the first one had not been made. In such a case, it would be manifestly wrong to treat both of the dividends as illegal in the hands of the stockholders. The last one might have been retained by the corporation to satisfy its claim against the stockholders for the first one, which was illegal; but when it has been paid over, a different question is presented. The question then is, Which one of the two is subject to reclamation? The first one the stockholders have no right to retain, because it was unauthorized, and therefore it is undoubtedly subject to reclamation. If, then, the corporation has a right to reclaim the last one also, it might be able to compel both of them to be refunded. It is evident, therefore, that it is indispensably necessary, in order that the court may be able to determine how many and which of the dividends were illegal; that is, how many of them were subject to reclamation, if any, that all the dividends that have been made, and the condition of the corporation when they were made, should appear.

The next subject of inquiry is, Supposing some of these dividends to be illegal, did the right to reclaim them pass to

the trustee by the deed of trust which was executed by the corporation?

The solution of this question involves two matters of inquiry: first, had the corporation a right to reclaim these dividends? and in the second place, if the right existed, did it pass by the deed under the peculiar circumstances in this case?

The declaration of these dividends was undoubtedly made in good faith, although it was made under a misconception of what constituted the profits of the company out of which the board of directors were authorized to make dividends. This court, in the case of *Gratz v. Redd*, 4 B. Mon. 191, intimated an opinion, although the question was left undecided, that the company could reclaim dividends which had been made under similar circumstances. It would seem, according to well-settled general principles, that if dividends were made under a misconception on the part of the directors of what constituted profits, and under a belief that there were profits to divide, when in fact there were none, they might be reclaimed; because the stockholders who received them were not entitled to them, and they had been paid over and received under the operation of a mutual mistake.

We are unable to perceive any reason why this equitable principle should not apply in the case of a mistake by a corporation as well as when made by individuals. The stockholders do not act in a corporate capacity in receiving a dividend. They do not therefore ratify the illegal act of the board of directors by receiving it. Besides, as they were not apprised that the dividends were illegal, their consent to the act of the directors in declaring them could not be implied from their receiving of them, even if in so doing they acted in a corporate capacity. We are therefore of the opinion that the corporation had a right to reclaim such dividends as were illegally declared, and which the stockholders had no right to retain.

Did, however, the right which the corporation had to the dividends which had been wrongfully declared pass to the trustee by the deed of assignment? The language of the deed is comprehensive enough to pass this right as well as all others. By the granting clause therein, the company transferred and conveyed to Buckner, as trustee, "all of its property of every description, whether real, personal, or mixed, judgments, notes, bills, open accounts, or other claims, or choses in action, wherever the same may be situated, and in whosoever hands the same may be found." It is argued, however, that as the

president and directors of the company had not at any time previously to the execution of the deed asserted the right of reclamation, and did not even then admit that these dividends had been made unlawfully, it could not have been in the contemplation of the parties that the right to reclaim them should pass by the deed; and that it did not pass unless it was the intention of the parties to the assignment that it should do so.

The words used by the parties are sufficient to pass the right, and we cannot perceive on what principle it can be excluded from the operation of the deed. It is not pretended that there was any mistake in its execution. There is no ambiguity in the terms used, nor any ground upon which parol testimony can be admitted to explain the intention of the parties, or to change the legal effect and operation of the deed. How, then, can any restriction be placed upon the legal effect of the written instrument? Not, certainly, from anything contained in it, for its language is plain, comprehensive, and unambiguous; not from anything extrinsic, because a resort to such facts is, according to the well-settled principles of the law, wholly inadmissible.

It is argued, however, that the extrinsic facts necessary to produce a change in the legal effect of the deed are admitted by the parties, and therefore their admission in giving construction to the writing does not violate any settled principle of the law. This assumption is not warranted by anything contained in the record. The trustee did not admit that the right to these dividends did not pass to him under the deed, nor that the company did not know at the time of its execution that such a right existed, although he stated that he was himself ignorant of the fact. Nor did the plaintiffs themselves state in their petition that the company did not know, when the deed was executed, of the existence of this right of reclamation, or that it did not pass by the deed of trust; but on the contrary, charged expressly that it did pass to the trustee by the terms of the deed, if the deed itself was valid, and not fraudulent and void. So that in reality there was no issue between the parties which required an acknowledgment or a denial of the extrinsic facts relied upon to limit the legal effect of the deed.

But if it did appear in a legal and competent mode that the authors of the deed, and the trustee likewise, were of the opinion at the time of its execution that these dividends had been all legally declared, and no right of reclamation existed, it would not necessarily follow that the right, if it did exist, did not pass by the deed. It is apparent, from the language used, that it was

the intention of the parties to the instrument that all the claims and choses of action of every description which belonged to the company should be transferred to the trustee. This intention is manifest on the face of the deed itself. Can it be defeated by showing that the authors of the deed were ignorant of the existence of some of the rights or claims of the company? The deed does not transfer merely the known and acknowledged claims and choses in action, but also those of every description, and embraces both the known and the unknown. So far, then, as the construction of the deed depends upon the question of intention, it is evident that it should be permitted to have its legal effect; for we think, considering the language used therein, the proposition may be assumed as undeniable, that if the existence of the right had been known to the makers of the deed it would not have been excluded from its operation. As, then, the terms used clearly embrace the right, and the intention to exclude it cannot be deduced, even from the facts relied upon to change and restrict the operation of the deed, it must be regarded as having passed to and vested in the trustee for the benefit of the *cestuis que trust*.

This view is sustained to some extent by the decision in the case of *Bayard v. Hoffman*, 4 Johns. Ch. 450. In that case, a debtor made a voluntary settlement of United States stocks upon his wife and children, by conveying them to trustees for their benefit; and he subsequently made an assignment "of all his estate, real and personal, and of all books, vouchers, and securities relative thereto." Chancellor Kent decided that the general assignment for the benefit of creditors carried with it the stock thus voluntarily assigned, and the trustees under the voluntary settlement were decreed to hold the stock subject to the order of the trustees under the general assignment. Effect was there given to the same principle that has been applied in the present case. The words used were sufficiently comprehensive to embrace and transfer the stock, and it was therefore held to have passed by the general assignment.

Can the stockholders rely upon the statute of limitations to protect themselves against the recovery of these dividends? The only argument that has been urged against their right to avail themselves of the statute is, that the dividends were a part of a trust fund, and should be regarded as having been received by them as such, and held by them as trustees. The doctrine is well settled that such express and continuing trusts as are within the exclusive jurisdiction of courts of equity, and are not

cognizable at law, are not affected by the statute of limitations. But here there was no express trust; if any existed, it resulted by implication from the facts of the case. The money was received by the stockholders in their own right, as that to which they were legally entitled, and there is nothing which authorizes the inference that they ever agreed to hold it in trust, or claimed it otherwise than as belonging to themselves. Besides, the corporation could have maintained an action at law for the recovery of the money received by them; and a court of equity would have had no jurisdiction to have adjudged its repayment to the corporation. If, then, it constituted a trust at all in the hands of the stockholders, it was not an express trust, but received its character from legal implication, and was not such a trust as is within the exclusive jurisdiction of courts of equity, but was cognizable in a court of law, and consequently lacked the essential attributes of those trusts that are exempted from the operation of the statute.

It was held by this court, in the case of *Dudley v. Price*, 10 B. Mon. 84, that the stockholders in a similar case were clearly entitled to the protection of the statute, and we still approve of the principle laid down in that decision. Indeed, we cannot perceive how any other result is attainable without a clear departure from the well-settled and universally recognized doctrines of the law upon the subject. "Possible, eventual, or resulting trusts occur where a party who took possession in his own right, and was *prima facie* the owner, is afterwards converted into a trustee by evidence. In these latter cases it was never doubted that length of possession would be a bar on the principle of the statute of limitations:" *Decouche v. Savetier*, 3 Johns. Ch. 216 [8 Am. Dec. 478]; *Coster v. Murray*, 5 Id. 531; *Beckford v. Wade*, 17 Ves. 87.

If these illegal dividends were a trust fund in the hands of the stockholders, they were made so by evidence which made it appear that they were declared at a time when there were no profits on hand to divide. The trust, if thus established, was clearly an implied trust created by testimony, and arising out of the facts of the case. In 2 Story's Eq. Jur., sec. 1252, it is said: "Perhaps to this same head of implied trusts upon presumed intention (although it might equally well be deemed to fall under the head of implied trusts by operation of law) we may refer that class of cases where the stock, and other property of private corporations, is deemed a trust fund for the payment of the debts of the corporation; so that the creditors have a lien,

or right of priority of payment on it, in preference to any of the stockholders of the corporation. Thus, for example: 'The capital stock of an incorporated bank is deemed a trust fund for all the debts of a corporation, and no stockholder can entitle himself to any dividend or share of such capital stock until all the debts are paid; and if the capital stock should be divided, leaving any debts unpaid, every stockholder receiving his share of the capital stock would, in equity, be held liable *pro rata* to contribute to the discharge of such debts out of the funds in his own hands.' "

If the corporation itself holds its property and effects only on an implied trust for the payment of its debts, most certainly the stockholders, if they receive part thereof by way of dividends, cannot be regarded as holding it, if in trust at all, under an express trust for the payment of debts when it was not thus held by the corporation. Can the right of the latter to rely upon the statute of limitations, when sued by a creditor, be doubted? If such a right exists, it proves conclusively that a corporation does not hold its assets under an express trust for the payment of debts; for if it did, the statute could not be used by it as a defense against any demand that a creditor might attempt to assert.

Thus it is fully established, both upon principle and authority, that the dividends in the hands of the stockholders, if a trust fund at all, were held by them under an implied, and not an express, trust. And the doctrine is well settled, that the trusts which are not to be affected by the statute of limitations in a court of equity are only those direct, express, and continuing trusts which fall within the peculiar and exclusive jurisdiction of courts of chancery, and not those created by implication merely: *Kane v. Bloodgood*, 7 Johns. Ch. 89 [11 Am. Dec. 417]; *Talbott v. Todd*, 5 Dana, 199; Angell on Limitations, 354; *Walker v. Walker*, 16 Serg. & R. 379. The decision in the case of *Wood v. Dummer*, 3 Mason, 308, instead of militating against, rather tends to fortify the conclusion that the stockholders held the fund under an implied or constructive, and not an express, trust. In that case, a dividend of the capital stock of a bank had been made among the stockholders in pursuance of an order made at a meeting held by themselves. The corporation was dissolved by the expiration of the time for which it had been chartered, and of the legislative limitation by which its existence had been subsequently continued for a limited time. A suit in equity was brought by the holders of the notes of the bank against the

stockholders for the payment of them out of the capital stock in their hands. The court decided, not that the statute of limitations would not apply to such a case, but only that the bar could not, on the facts of the case, be sustained. The court said: "The rights of the plaintiffs accrued as against the defendant's within six years; for until a refusal of payment by the bank of its notes, followed by an inability to discharge them, there was no cause of proceeding in equity against the defendants."

How long the funds had been in the hands of the stockholders before the suit was commenced does not appear; but all that the court did actually decide in relation to the operation of the statute was that upon the facts the time necessary to constitute a bar had not elapsed, and therefore the bar to a decree could not be sustained. The court, however, in the same case, held that the simple fact that the defendants had the funds in their possession could not alone entitle the plaintiffs to relief without allegations of insolvency on the part of the corporation, or of the non-existence of other funds. Such an admission was a virtual concession that no express trust existed; for if the stockholders, by the reception of the fund, were thereby made the trustees of the creditors, and held it under a direct and express trust for the payment of the debts of the corporation, a suit in equity for the enforcement of the trust was the appropriate remedy; and no allegation of the insolvency or dissolution of the corporation, or of the non-existence of other funds for the payment of its debts was necessary to entitle the plaintiffs to relief.

But it is contended that if the statute does apply in a case like the present, that still the time of limitation had not run when this action was commenced by the creditors, and consequently the bar was not then complete. The right of action for the recovery of these funds was in the corporation; it existed as soon as they were paid over to the stockholders, and the time of limitation commenced running from that period. When the bar became complete against the corporation, it was also complete against its creditors. If the debtor cannot recover a demand because it is barred by the statute of limitations, most certainly the creditor of the debtor cannot compel its payment in discharge of his debt on the ground that his cause of action had accrued within five years. His cause of action exists against his debtor, and he can only follow the funds of the latter into the hands of third persons, when it is his only remedy for the recovery of his debt; and his rights then, in the pursuit of such funds, do not exceed those that belong to his debtor.

But it is unnecessary to pursue this investigation any further, inasmuch as the right to the funds in the hands of the stockholders passed to the trustee under the assignment, and the right thus acquired by him is subject to be affected by the statute to the same extent it would be if it still belonged to the corporation; and there can be no pretext for considering it as a trust fund in the hands of the stockholders for the benefit of the company.

In the case of *Wood v. Dummer*, *supra*, the corporation was dissolved and the stockholders had distributed the capital stock among themselves. No right of action against them existed in favor of any person except the creditors of the corporation. Hence the court decided that as the plaintiffs' action accrued within six years (the time of the limitation in that state), the bar was not complete and could not be sustained. Between that case and this there is a marked and obvious distinction. Here the dividends were made, not by the stockholders, but by the board of directors. No part of the capital stock was distributed, but only a fund which was erroneously supposed to constitute actual profits; and which the corporation had a right to sue for and reclaim immediately after the dividends were paid over. In addition to this, the stockholders in the one case received the capital stock, knowing that it was the proper fund for the payment of the debts of the corporation, and might be presumed to have held it subject to that charge; whereas, in the other, they received the dividends as a fund to which they believed themselves entitled, which they held and claimed as belonging to themselves exclusively, and the right to which, in any other person, was virtually denied by them.

The ignorance of the directors with regard to the right of the corporation to retain the dividends cannot be relied upon to prevent the running of the statute. The facts were all known to them, and by the exercise of reasonable diligence they could have ascertained, and it was their duty to do it, whether or not the dividends were authorized by the charter. Willful ignorance, or that which results from negligence and the want of that degree of vigilance which the law requires, cannot be deemed sufficient to prevent the operation of the statute.

Nor can the manner in which part of the dividends were used by the stockholders have any effect on the rights of the parties under the statute. The stock notes upon which they were credited having been voluntarily canceled and delivered up, the right to sue upon them does not exist; and the

only action that can be maintained is one either for the recovery of the illegal dividends, or for relief in a court of equity on the ground of mistake, upon the principle on which settled accounts are opened and mistakes are corrected. In such cases, unless an action be commenced within five years after the discovery of the mistake, the remedy will be barred. It cannot be admitted that if a note be surrendered, upon a settlement between the parties, the payee can, on the ground of a mistake in the credits allowed, institute an action at any time within twenty years, regarding the note as the foundation of the action, and thereby entitle himself to all the rights he would have if the note were in existence. Such a principle might subject the payor of the note to great injury, from the loss of testimony by the lapse of time, and is not sanctioned by any of the adjudged cases to which we have been referred. The cases of *East India Co. v. Neave*, 5 Ves. 173, and of *East India Co. v. Donald*, 9 Id. 275, only decide that where a written instrument has been delivered up in ignorance of a matter which would have authorized its retention, and the assertion of a demand upon it, the party will be entitled to relief against the obligor in a court of chancery, on the ground that he has no legal remedy in consequence of having parted with the written instrument in ignorance of his rights. They do not decide anything upon the subject of the time within which such relief will be granted; and as the principle laid down in Story's Eq. Jur., sec. 167, that if an instrument be canceled through a mistake, the obligee "ought to have the same benefit as if the instrument were in his possession, with its entire original validity," is based upon the two cases just mentioned, the author should be understood as merely asserting the same doctrine upon which those cases were decided, and as referring, not to the time in which relief against the mistake might be obtained, but to the extent of the relief to which the party would be entitled under such circumstances. He would have a right to a decree for the same amount that he could have recovered at law "if the instrument were in his possession, with its entire original validity." Nothing more is decided by the cases referred to, nor should the author be understood as asserting a broader or more comprehensive principle.

But if we are mistaken in this view of the question, there is one aspect of it that is conclusive as to the right of the stockholders to rely upon the statute. A court of equity will, as a general rule, only take jurisdiction and grant relief in cases

where the instrument has been voluntarily delivered up when the party has no legal remedy; and it is upon this ground alone that the court assumes jurisdiction, or interposes in his favor even where the surrender of the instrument has occurred through mistake. Where a party has an adequate remedy at law, a court of equity will not entertain jurisdiction: *Waggoner v. McKinney*, 1 A. K. Marsh. 479; *Williams v. Dorsey*, 4 Litt. 265; *Carlyle v. Long*, 5 Id. 167.

Now, in this case an action at law would have been maintained for the recovery of the dividends. In such an action the remedy would have been as full and complete as it could be made in a court of equity, on the ground that the notes on which the dividends were applied as credits had been delivered up and canceled through mistake. In both courts the dividends would be the subject-matter in controversy, and the recovery would be limited by their amount. The remedy therefore being complete at law, there could be no necessity for a resort to a court of equity. But conceding it to be a case of concurrent jurisdiction, which is all that can be contended for, and that a remedy might be had in either court, then the well-settled doctrine would apply, that in such cases, when the remedy at law has been barred by the statute, the limitation will be inflexibly applied in a court of equity, precisely as it operates at law, with the single exception that it will not be allowed to operate in cases of fraud or mistake until they have, or should have, been discovered: *Gates v. Jacobs*, 1 B. Mon. 306.

But it is contended that no action at law could be maintained for the dividends which were credited upon the stock notes; and that such an action could only be maintained for those dividends which had been paid in money. There are, however, cases when money is considered as received or advanced where it is not actually done. This is a case of that kind. The dividends were declared, and the stockholders were, under the order of the board, entitled to the money. But as they still owed some part of their stock notes, they accepted a credit upon the notes in lieu of the money. The transaction was substantially a payment of the money to the stockholders, and a repayment of it by them on their stock notes. This principle was recognized in the case of *Gray v. Gray*, 2 J. J. Marsh. 22, in which it was decided that the plaintiff who had surrendered a note to the defendant, which he held upon him, could, if the consideration upon which the note was surrendered had failed, maintain an action of *assumpsit* for money had and received for the

amount due upon the note at the time it was surrendered, the surrender of the note being deemed equivalent to the actual payment of the money. We are therefore of the opinion that an action at law could be maintained for such dividends as were credited upon the stock notes, as well as for those that were paid in money, whenever the dividends so credited or paid were subject to reclamation.

The limitation of five years would bar the remedy at law; the statute must therefore have the same effect and operation if the remedy be pursued in a court of equity.

We do not deem it necessary to decide whether the debts against the corporation, which some of the stockholders purchased after the execution of the deed of trust, could or not be rendered available as a set-off in an action by the trustee for the recovery of the illegal dividends. No such action has been instituted, nor has the trustee asserted a claim to them in this action in such a manner as to require it to be noticed by the stockholders. More than five years have elapsed since the last dividend was paid, and since the stock notes were surrendered to the stockholders. The claim is therefore barred by the statute of limitations, and consequently the validity of these debts as a set-off is immaterial. The trustee, in his answer, prayed that he might be united with the plaintiffs as a co-plaintiff in the action, and that the suit might progress in that form so that if the dividends were illegal, and he were entitled to them, the payment of them might be adjudged to him. But no such order was made, and if it had been made, the defendants would not have been bound to notice the claim unless it had been asserted by an amended petition, upon which the service of process on them would have been necessary, inasmuch as the recovery of the dividends by him would have been based upon a different ground from that assumed by the original plaintiffs.

It is contended, however, that a *cestui que trust* may come into a court of equity not only to enforce the trust itself, but also to compel the debtors of the assignor or grantor to pay their debts to the trustee for the purposes of the trust; and to sustain this doctrine, the case of *Bixler v. Taylor*, 3 B. Mon. 362, is relied upon.

In that case the trustee had sold the trust property to a third person, and the object of the bill was to remove the trustee and compel a surrender of the property to its proper custody. For that purpose, it was decided that a court of equity had jurisdiction. The principle of that decision is obvious. The trustee had violated his duty and committed a breach of trust. On that

ground, the *cestui que trust* had a right to apply to a court of equity for relief. The same principle enables an heir or distributee to maintain a suit in equity for property belonging or for a debt due to the estate, where the administrator or executor refuses to bring an action for it, or denies that the estate of his testator or intestate has any right to it. But that one beneficiary out of many has a right to bring an action in his own name against the debtors of the trust fund without alleging any reason for bringing the action, except that he has an interest under the deed of assignment, is a position wholly untenable. Such a practice might lead to inextricable confusion, and an almost unlimited multiplicity of actions. If such an action can be maintained by one *cestui que trust*, of course the others have the same right, and yet none of them would have a right to collect the money, but only to have it paid over to the trustee. The trustee is the proper person to maintain the action, and none of the beneficiaries have a right to bring it in their own names unless they show a sufficient reason for so doing. Under the civil code, the trustee can bring the action, and prosecute it in his own name, without joining with him any of the beneficiaries or making them parties to the action. He represents all the parties interested, and principle and convenience alike require that actions for debts due to the trust estate shall be brought by him, and not by any of the beneficiaries.

The plaintiffs did not, in their original or amended petitions, allege that the trustee refused to bring suit for these dividends, or state any other ground upon which they claimed the right to sue for them, if the deed of assignment should not be vacated. On the contrary, in that event, they did not claim the right to sue for them, but expressly called upon the trustee to do it. They brought their action to vacate the assignment, on the ground that it was fraudulent, and only claimed the right to have the dividends appropriated to the payment of their demand if they succeeded in their effort to set aside the assignment. If they failed to accomplish that object, they admitted that the right to collect the claims which the company had against the stockholders for illegal dividends passed to the trustee by the terms of the assignment, and they alleged that he was in duty bound to collect them, and called upon him to do it. Consequently they neither asserted a right to maintain an action for these dividends, if the deed of assignment were valid, nor did they allege the existence of any ground that would have enabled them to maintain it, if they had asserted a right to do so.

It has been contended in argument that the trustee, by failing to bring suits for these dividends when called upon to do it, has violated the trust, and rendered himself liable for the amount of the dividends. We deem it only necessary to remark on this subject that the pleadings do not contain any charge against the trustee of having violated his duty, nor has there been any litigation between the parties with respect to this matter in the court below. Consequently the question attempted to be made in the argument does not arise upon the record in this case, nor can we adjudicate upon it. And as the right to the dividends passed to the trustee under the deed, it is not deemed necessary to decide whether the plaintiffs, as mere general creditors, not having obtained a judgment at law and an execution thereon with a return of *nulla bona*, could come into a court of equity for the purpose of having this fund applied to the payment of their demand. It is perfectly manifest, however, that they did not claim the right to do so on the ground that the corporation was dissolved, and for that reason an action at law could not be maintained against it. Neither their original petition nor their amended petitions contain any such allegations; but on the contrary, the corporation is made a defendant and proceeded against as being still in existence; and it cannot be admitted that a general assignment of all its property and effects in trust for the payment of debts will of itself have the legal effect of producing a dissolution of a corporation.

But the plaintiffs, as beneficiaries under the deed, had a right to come into a court of equity to obtain their ratable part of the trust fund. The effort which they made to impeach the validity of the deed was rather repugnant to the claim they asserted to the benefit of its provisions. But this claim was only relied upon by them in the event of their failure to have the deed vacated as fraudulent; and as that object has not been accomplished, they have, in our opinion, a right to maintain their action for the enforcement of the trust, and the recovery of that portion of the trust fund to which they may be entitled: *Replier v. Buck*, 5 B. Mon. 98.

At the time the assignment was executed the plaintiffs had in their hands a large amount of debts and securities which were the property of the company, and which passed to the trustee by the deed of assignment, subject, however, to the right of the plaintiffs to hold them as collateral security for the amount due to them by the company at the time they had notice of the assignment. After deducting therefrom the amount due to them

at that time, the balance, if any, they must account for to the trustee. They have no right to retain it for the payment of subsequent advances, unless such advances were made in discharge of a previous personal liability incurred by them for the company. Upon their subsequent collections they have a right to a reasonable compensation, which may be fixed at ten per centum, that being the commission which the company had agreed to allow them on their previous collections.

Wherefore the judgment of the circuit court is reversed and cause remanded, that a judgment may be rendered against the corporation for the debt due to the plaintiffs, and for further proceedings consistent with this opinion, whereby the amount of the trust fund to which the plaintiffs will be entitled may be ascertained and its payment adjudged to them.

CORPORATOR MAY BE DEBTOR OR CREDITOR OF CORPORATION, and as creditor take a mortgage: *Gordon v. Preston*, 26 Am. Dec. 75.

CORPORATION IN FAILING CIRCUMSTANCES MAY ASSIGN ITS PROPERTY to trustees for the benefit of preferred creditors: *State v. Bank of Maryland*, 28 Am. Dec. 561, note 575; and such a conveyance is not fraudulent as to other creditors by reason of giving such preference: *Sargent v. Webster*, 46 Id. 743.

DEED OF ASSIGNMENT, WHAT PROPERTY PASSES BY: See *Scott v. Coleman*, 15 Am. Dec. 71; *Wilkes v. Ferris*, 4 Id. 364, and note 366.

STATUTE OF LIMITATIONS WILL BAR AS TO TRUSTS CREATED BY OPERATION OF LAW, THOUGH IT MAY NOT IN CASES OF EXPRESS TRUSTS: *McDowell v. Goldsmith*, 61 Am. Dec. 305, and note 317, collecting prior cases in this series; *Presley v. Davis*, 62 Id. 396; and that statute of limitations applies to all implied trusts, but not to subsisting continued and acknowledged trusts, see *Tinnen v. Mebane*, 60 Id. 205, and note 212; *Philips v. State*, 64 Id. 635, and note 636.

TIME BEGINS TO RUN WHEN RIGHT OF ACTION ACCRUES, NOT WHEN PERSON IGNORANT OF HIS RIGHTS comes to the knowledge of them: *Thomas v. White*, 14 Am. Dec. 56; and ignorance of one's rights, when not owing to the fraud or default of the debtor, does not prevent the operation of the statute of limitations: *Jordan v. Jordan*, 16 Id. 249; see also *Tinnen v. Mebane*, 60 Id. 205, and note 212, collecting prior cases in this series.

WHERE PARTY CAN FIND IN COURT OF LAW FULL AND ADEQUATE REMEDY, court of equity does not open its door to him: *Doggett v. Hare*, 58 Am. Dec. 464, and cases referred to in note thereto 475; *Redmond v. Dickerson*, 59 Id. 418; *Andrews v. Sullivan*, 43 Id. 53; *Smith v. Pettingill*, 40 Id. 667; and see *Vann v. Hargett*, 32 Id. 689, and note 695.

STATUTE OF LIMITATIONS IS APPLIED ALIKE, BOTH AT LAW AND IN EQUITY, where the remedy is concurrent: *Johnson v. Toulmin*, 52 Am. Dec. 212, and note 221; *Hamilton v. Hamilton's Ex'rs*, 55 Id. 585; *Perkins v. Cartmell*, 42 Id. 753; *Tarlettin v. Goldthwaite's Heirs*, 59 Id. 296.

THE PRINCIPAL CASE IS CITED in *Roberts v. Roberts*, 7 Bush, 104, to the point that in case of an express trust between the holder of funds and those who will finally be entitled to them, there is no adverse possession, and the trust will not be barred by any length of time.

COWAN v. CAMPBELL'S ADMINISTRATOR.

[17 B. MONROE, 522.]

ACTION OF DEBT CANNOT BE MAINTAINED AGAINST EXECUTOR, under Kentucky statute of 1797, for a forfeiture incurred by his testator on a penal statute. STATUTE OF KENTUCKY, PASSED IN 1812, SAVING RIGHT OF ACTION FOR PERSONAL INJURIES TO OR AGAINST ADMINISTRATORS AND EXECUTORS, in like manner with actions founded on contract, embraced actions for personal injuries only, and did not apply to injuries to real estate.

ACTION GIVEN BY STATUTE AGAINST PARTY, BUT WHICH ABATES BY HIS DEATH, cannot be maintained against his personal representative.

UNDER REVISED STATUTES OF KENTUCKY, IT IS NOT MADE DUTY OF ADMINISTRATOR who has the control of slaves merely for the purpose of administering the estate of his intestate to list a statement of them with the clerk of the county court, nor can he be fined for failing to do it.

APPEAL from the circuit of Pulaaki county. The opinion states the case.

B. M. Bradley, for the appellant.

The appellees were not represented by counsel.

By Court, SIMPSON, J. This action was brought by the heirs and distributees of W. G. Cowan, deceased, against the administrator of A. Campbell, for the failure of the defendant's intestate, who had intermarried with the widow of said W. G. Cowan, to make out under oath and file for record in the clerk's office of the county court where he resided the names of the slaves, and their respective ages, that had been allotted as dower to his wife out of the estate of her deceased husband. A demurrer to the petition was sustained by the circuit court, and judgment rendered for the defendants, from which the plaintiffs have appealed.

By an act passed in 1839, 3 Stat. Law, 554, it was made the duty of all persons holding a life estate in slaves to make out and file with the clerk of the county court annually such a list of said slaves as therein required; and for the failure to do so, they were subjected to a forfeiture of one hundred dollars, to be recovered by action of debt by the persons entitled to the slaves in reversion or remainder. This act was repealed by an act of 1844, Sess. Acts, 1843-4, p. 84, which required the performance of the same duty by persons holding a life estate in slaves, and subjecting them, for a failure to comply with the requisitions of the statute, to a fine by presentment of a grand jury, not exceeding fifty dollars for each failure. By the revised statutes, p. 628, the same duty is imposed on the owner of a

life estate in slaves; and for a failure to file such annual statement, he is made liable to a fine not exceeding fifty dollars for each offense, for the use of the person in remainder, to be recovered by suit or indictment, at the cost of the person suing.

The fine imposed by the act of 1844 was not declared to be for the benefit of the persons entitled to the slaves in reversion or remainder; and as it could only be recovered under a presentment by a grand jury, no suit for it could be maintained in the name of the reversioner or remainderman, and when collected, it was not for his benefit, but was to be used for the same purpose that other fines were directed to be appropriated by the law in force at the time of their recovery.

The principal question, however, that arises on the demurrer is, Can an action be maintained against the personal representative of the offender after his death, either under the act of 1839, or under the revised statutes? or does the action abate by the death of the party? By the principles of the common law, all actions founded on a tort died with the person. This rule of the common law underwent considerable alteration by the statute of 4 Edw. III., which was re-enacted by the legislature of this country in 1797: 1 Litt. 624. But even under the law as thus modified, debt could not be maintained against an executor for a forfeiture incurred by his testator on a penal statute: Com. Dig., tit. Administration, B, 15. By an act passed in 1812, 1 Stat. Law, 88, it was enacted that no species of actions for personal injuries shall cease or die with the person, except actions for assault and batteries, slander, criminal conversation, and so much of the action for malicious prosecution as is intended to recover for the personal injury; but that for any other injury than those therein excepted, an action might be brought and maintained by executors or administrators, or against executors and administrators, in like manner with causes of action founded on contract.

It was decided in the case of *McAfee v. Kennedy*, 1 Litt. 92, that this act embraced actions for personal injuries only, and did not apply to injuries to real estate. Now, this action is not brought for a personal injury, nor is the penalty inflicted by the statutes imposed on account of an injury, either to the person or the property of another; but it is inflicted for a failure to comply with the requisitions of the law, which failure might be productive of injury to the rights of other persons. The action for the penalty under these statutes is not embraced either by the letter or the spirit of this act. And as the penalty is in its nature

personal, being a fine against the offender, the action given by the statute abates by his death, and cannot be maintained against his personal representative.

Under the revised statutes, if the owner, guardian, or husband fail to comply with the law, they are made liable, but it is not made the duty of an administrator, who has the control of the slaves merely for the purpose of administering the estate of his intestate to list a statement of them with the clerk of the county court, nor is he subjected to a fine for failing to do it.

Wherefore the judgment is affirmed.

ABATEMENT OF ACTION BY DEATH OF PARTY generally, but not under statute provision: See *Pette v. Ison*, 56 Am. Dec. 419, and note 420, collecting prior cases.

PATCH v. CITY OF COVINGTON.

[17 B. MONROE, 722.]

MUNICIPAL CORPORATION IS NOT LIABLE IN DAMAGES FOR VALUE OF PROPERTY DESTROYED BY FIRE in consequence of the failure on the part of the city authorities to keep its public cisterns in repair, and to provide its fire-company with hooks, ladders, and other necessary apparatus.

TO SUSTAIN ACTION, DAMAGES TO BE RECOVERED must be the natural and proximate consequence of the act or omission complained of.

APPEAL from the circuit court of Kenton county. The opinion states the case.

Stevenson and Kinkead, for the appellant.

Menzies and Pryor, for the appellee.

By Court, DUVALL, J. This is an action brought by the appellant against the city of Covington to recover the value of a house, which it is alleged was destroyed by fire in consequence of the failure on the part of the city to keep its public cisterns in repair, and to provide the fire-company of the city with hooks, ladders, and other necessary apparatus. The circuit court sustained a demurrer to the petition, and from that judgment the plaintiff has appealed.

This court has recognized the doctrine that where a particular act operating injuriously to an individual is authorized by a municipal corporation, by a delegation of power, either general or special, it will be liable for the injury in its corporate capacity where the acts done would warrant a like action against an individual; that cities are responsible to the same extent and in

the same manner as natural persons for injuries occasioned by the negligence or unskillfulness of their agents in the construction of works for their benefit; and that where a city corporation is bound to keep the streets and sewers of the city in proper repair, it is liable to damages if any person be injured by its neglect to have such repairs made: *Prather v. City of Lexington*, 13 B. Mon. 561 [56 Am. Dec. 535], and the cases there cited.

Hence it follows that where, as in the case cited by counsel for appellant, of *Henly v. Mayor of Lynn Regis*, 6 Bing. 100; S. C., 3 Barn. & Adol. 77; S. C., 1 Bing. N. C. 222, the city neglected to keep a sea-wall in repair, in consequence of which the grounds of the plaintiff were inundated; or where a ditch is allowed to remain open in a street, and a person is injured by falling into it; or where a sewer is, by the negligence of the city, made so small that in a heavy rain the water could not pass off, but was forced back into the houses of the inhabitants;—in all such cases the liability of the corporation is undeniable, and rests upon the same principles that would determine the liability of a private person.

This principle, as stated by Greenleaf, is that “the damage to be recovered must always be the natural and proximate consequence of the act complained of. This rule is laid down in regard to special damages, but it applies to all damage. Thus, where the defendant had libeled a performer at a place of public entertainment, in consequence of which she refused to sing, and the plaintiff alleged that by reason thereof the receipts of his house were diminished, this consequence was held too remote to furnish ground for a claim of damage:” *Greenl. Ev.*, sec. 256. “But it is far easier,” says Sedgwick in his treatise on the measure of damages, chapter 3, “to lay down a general proposition than to apply it to a particular case. When we come to analyze causes and effects, and undertake to decide what is the natural result of a given act, and what is to be regarded as unnatural, what is proximate and what remote, we shall find ourselves involved in serious difficulty. Many things are perfectly natural, and yet very remote, consequences of a particular act; many other results are proximate, nay, immediate, and yet so little to be expected that they can scarcely be pronounced natural. Nor does the requirement that the damage be both natural and proximate relieve us from the difficulty. The rule is not much more definite when it is said that the damages must be the legal and natural consequence of the act com-

plained of. As in a case in which the defendant had slandered the plaintiff, who was employed by one J. O. as a journeyman for a year at certain wages, by saying that he had cut certain flocking-cord, and the plaintiff claimed special damage for his discharge by J. O., in consequence of the slander, before the expiration of the year, it was held by Lord Ellenborough that the discharge of the plaintiff by J. O. was a mere wrongful act, and not 'the legal and natural consequence of the slander complained of.'"

The learned author has collected a great number of cases on this subject, English and American, in all of which the courts profess to recognize and adhere to the rule stated, though the decisions exhibit some want of uniformity, resulting chiefly, however, from the different classes of cases to which it has been applied. In actions of tort, for instance, it has been held, even where vindictive damages cannot be demanded, that the degree of fault will govern not only the question of liability, but the amount of remuneration; and accordingly as the act is more or less morally wrong, so the courts will make the guilty party responsible for the consequence, more or less remote of his conduct. The effect of this, says Sedgwick, will be to introduce into the subject of wrongs the most perplexing distinctions; the tribunal will, in each case, have to decide not only a legal but a moral question, and to determine, moreover, the amount of consequences for which a given amount of immorality or negligence is to be made answerable. And he concludes his able review of all these decisions by saying that "it would be better in all matters of tort, where the wrong is not so flagrant as to warrant vindictive damages, to adhere as closely as possible to a fixed rule; to declare that in no case shall the measure of relief depend on the motive of the party, and that the remuneration is, in all cases, to be limited to the natural and proximate consequences of the act." The rule as thus laid down has been strictly adhered to by this court in all cases in which similar questions have arisen. In the case of *Bosworth v. Brand*, 1 Dana, 377, the defendant had permitted about fifty slaves to assemble and dance in an outhouse on his place; about midnight a patrolling party surrounded the house for the purpose of apprehending the negroes and breaking up the frolic; that the negroes refused to surrender when called upon, and endeavored to make their escape; that one of the patrol, without any necessity for so doing, wantonly fired a pistol into a dark room, crowded with negroes, and thereby killed the slave of Brand. The conduct of

Bosworth, in permitting this assemblage of slaves, was illegal, being contrary to the express provisions of the statute, and under which he was liable to an indictment. It was therefore contended that inasmuch as Bosworth's illegal act was the cause of the slave's death, he was liable to the owner in damages for his value. But the court held that "it is, in general, true that a man is entitled to reparation for every damage he sustains from the unlawful action or omission of another. But the damages must be the direct and immediate, or at least the proximate and natural, consequence of the act or omission complained of. It will not do to carry it to every consequence, however remote, which can be traced to the particular action or omission, and much less to such things as are not a natural consequence, and may have arisen from other and extraneous causes. . . . The true view of the case is that the permitting the negroes to assemble and remain at the frolic was not, properly speaking, the cause of the death. The cause was the wanton malice of the patrol; and if that had been produced by drink given by another, that other would have been a much more proximate cause of the death than either Bosworth or the frolic, yet we presume no one would contend for the liability of the giver of the drink." The same doctrine has been held in numerous other and more recent adjudications of this court: *King v. Shanks*, 12 B. Mon. 420, and cases there cited.

Do the facts set forth by the appellant in the case now before us make out a cause of action within the rule or principle we have been considering? He alleges that the fire by which his house was destroyed originated in a small frame building adjacent to his own; that the firemen had reached his house before the flames had communicated to it, and would have been, as he is informed, believes, and charges, able to save it, but that in consequence of the failure and neglect of the city council to keep in repair the public cisterns in the vicinity there was not sufficient water to extinguish the flames, and his building was therefore destroyed; that there were three public cisterns in the vicinity, but neither was in a condition to hold much if any water, owing to the neglect of the city authorities whose duty it was to keep them in repair; that they had undertaken to do this, taxing the appellant and other citizens for that purpose, and that they were notified that the cisterns required repairing; that the city had organized a fire department at considerable cost to the inhabitants, but had failed to provide the necessary hooks and ladders for its use, in consequence of which the firemen

had been unable to pull down the adjacent frame building before the fire reached his house; that in consequence of this two-fold negligence, his house, which was worth five thousand dollars, was consumed, and he therefore prays judgment for that sum.

It is not charged that the fire was the consequence, remote or proximate, of any act or omission on the part of the city. The legal import of the allegation is that the plaintiff's house was set on fire by the frame; that the destruction of his property which resulted from this cause would, in the opinion of plaintiff, have been averted by the firemen if the cisterns had not been out of repair through the negligence of the city. It is obvious, therefore, that the cause which produced this effect was wholly disconnected from and independent of the city, or of its acts or omissions. There was neither proximity in the order of the events nor the relation of cause and effect between the negligent omission complained of and the results which followed. As in the case of *Bosworth v. Brand*, 1 Dana, 377, the illegal act of Bosworth would have been followed by no injurious consequences but for the intervention of the real and immediate cause of the slave's death—the malicious shooting by the patrol; so here, the alleged negligence of the city council could not have occasioned the destruction of the appellant's house but for the intervention, in like manner, of the more immediate, and therefore real, cause—the burning of the adjacent building. If the cisterns had been full of water, and the city council had negligently and knowingly left them open or uncovered, in consequence of which the slave of the appellant had fallen in and drowned, their liability would have been unquestionable, upon the principle referred to, because then the damage would obviously have been the natural and proximate consequence of the negligence.

Upon the same principle, if the council had negligently permitted a ditch to remain open in the street, whereby the plaintiff's servant, in attempting to cross it, was killed or maimed, he could recover against them to the extent of the injury; but suppose the plaintiff's servant is suddenly attacked with a dangerous malady requiring the immediate aid of a physician; that one is sent for who could have reached his patient in time to save him, but was prevented by falling into the ditch thus negligently left open, whereby he was wounded and was unable to proceed farther, in consequence of which the slave died; or, as in the case put by this court in *Bosworth v. Brand*, 1 Dana, 377,

suppose the slave of one goes to the farm of another, and is not driven away in the time prescribed by the statute, and in consequence the slave is overtaken on his return home by a hurricane, and killed by the falling of the timber, will it be pretended that in either case the owner of the slave could recover his value? And yet they come within the principle which the counsel for the appellant insists is established by the numerous cases cited in his elaborate and able argument; namely, "that whenever injury occurs, directly or consequently, from the willful neglect of corporate duty, an action is clearly maintainable by a party especially injured, irrespective of the events or parties that intervene." Under this extension of the doctrine, every consequence of a given act or omission, however remote and unnatural, may become the foundation of a right of action, either against a corporation or an individual. No such comprehensive rule is deducible from the authorities when examined with reference to the facts involved and the points decided. Indeed, the utter impracticability of applying such a rule is a sufficient argument against its existence.

Upon a careful examination of all the authorities within our reach in which this perplexing question has been discussed, we conclude that the only reasonable principle to be deduced from them all is that to which we referred in the outset: that the damage to be recovered must be the natural and proximate consequence of the act or omission complained of; that the petition in this case, giving to every allegation of fact the effect to which it is entitled, on demurrer, fails to show cause of action, and that the demurrer was therefore properly sustained. We have arrived at this conclusion not without some hesitation, arising chiefly from the difficulty of determining, from the multitude of adjudged cases, the precise relation, as defined by the terms "natural" and "proximate," which should exist between the illegal act or omission, and the resulting damage, in order to entitle the injured party to redress.

The judgment is affirmed.

LIABILITY OF MUNICIPAL CORPORATION FOR ACTS DONE BY ITS OFFICERS OR AGENTS: See *Rochester White Lead Co. v. City of Rochester*, 53 Am. Dec. 316, and extended note thereto 320 et seq.; *Wallace v. City of Muscatine*, 61 Id. 131, note 133.

NATURAL, PROXIMATE, AND LEGAL RESULTS ARE ALL THAT DAMAGES CAN BE RECOVERED FOR: *Donnell v. Jones*, 48 Am. Dec. 59; *Harrison v. Berkley*, 67 Id. 578.

MUNICIPAL CORPORATION IS NOT LIABLE IN DAMAGES TO OWNER OF PROPERTY DESTROYED OR DAMAGED BY FIRE in consequence of neglect on its part to provide suitable engines or fire apparatus, or to provide and keep in repair public cisterns: 2 Dillon on Mun. Corp., 3d ed., 977, citing the principal case, with many others, in support of the above proposition: *Heller v. Sedalia*, 53 Mo. 161; S. C., 14 Am. Rep. 445, citing the principal case.

MUNICIPALITY IS NOT LIABLE FOR REMOTE DAMAGES, and the damages for which relief is sought must be the natural and proximate result of the act complained of in order to entitle the party to recover: *Robinson v. City of Evansville*, 78 Ind. 336, citing the principal case to this point.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

JOHNSON v. MARTIN.

[11 LOUISIANA ANNUAL, 27.]

PARTY IS NOT RESPONSIBLE FOR LOSS OF REMITTANCES BY LETTER deposited in post-office box specially set apart for his use.

AGENT CANNOT BE HELD LIABLE FOR NOT ANTICIPATING DANGER ALTOGETHER OUT OF ORDINARY COURSE OF BUSINESS, or of natural events, although he may properly be held responsible for a neglect to provide against risks or perils to which property intrusted to his care may in the ordinary course of business be exposed.

APPEAL from the third district court of New Orleans. The facts of the case are stated in the opinion.

Bonford, for the plaintiff and appellant.

H. and J. A. Gaither, for the defendant.

By Court, LEA, J. In this case the plaintiff seeks to make the defendant responsible for the loss of certain bank notes sent by mail, and addressed to the defendant, which were taken from the post-office by a third person (one Brownjohn), who had previously been in the employ of the defendant, but who had been discharged, as the petition alleges, for cause of dishonesty.

It is urged that the amounts remitted were delivered to the defendant by their deposit in his box in the post-office; and further, that the defendant was guilty of gross and culpable neglect in not giving notice to the postmaster that he had discharged his clerk, and in not instructing him not to deliver his letters to said Brownjohn.

The arrangement by which letters are deposited in boxes specially set apart for particular individuals is one which has been adopted for the convenience of their delivery; but the letters so deposited are under the exclusive control of the officers in the post-office, and are not delivered until they are handed to the person for whom they were intended, or his agents. There was therefore no delivery of the remittances to the defendant.

The next question to be determined is whether the defendant has been guilty of neglect.

An agent may properly be held responsible for a neglect to provide against the risks or perils to which property intrusted to his care may, in the ordinary course of business, be exposed, but he cannot be held liable for not anticipating a danger altogether out of the ordinary course of business or of natural events.

The plaintiff undertook to send a certain sum of money to the defendant; until it is received, the latter cannot be held accountable for it. At the time the robbery took place it was no more under the defendant's control than that of the plaintiff; and though we are not prepared to say that, under the peculiar circumstances of this case, as disclosed by the evidence, the plaintiff himself was guilty of neglect, yet nothing in the record justifies the assumption that the defendant was bound to protect the plaintiff against acts of fraud or violence which might be perpetrated upon the post-office by one who was not in his employ or under his control. We think the plaintiff is not entitled to claim from the defendant a reimbursement of the money of which he has been robbed by a third person, the act by which the loss was occasioned not being one which, under the circumstances, the defendant could reasonably have anticipated.

Judgment affirmed, with costs.

WATSON v. TEMPLETON.

[11 LOUISIANA ANNUAL, 187.]

DEMAND FOR PAYMENT OF NOTE OR BILL DUE BY PARTNERSHIP is a sufficient presentment if made within the usual business hours at the commercial domicile of the firm. It is not necessary to make a further demand at the private residence of the individual partners.

NOTARY COMPLIES STRICTLY WITH COMMERCIAL USAGE IN GIVING NOTICE EXCLUSIVELY TO LAST INDORSER, especially if he is ignorant of the residence of the other parties to a bill of exchange.

"THE DAY" WHICH EACH INDORSER IS ALLOWED WITHIN WHICH TO GIVE HIS NOTICES in turn will commence with that on which he himself receives notice, where the distance is such as to require an interval of several days for the purposes of communication.

HOLDER OF BILL OF EXCHANGE IS NOT BOUND TO MAKE PUBLIC PROCLAMATION, or to advertise for information concerning the residence of one whose domicile is without the state.

APPEAL from the district court, tenth district, parish of Carroll.

Selby, for the plaintiff.

Caldwell, for the defendant and appellant.

By Court, *LEA, J.* This is a suit by the holder against the drawer of a protested bill of exchange.

The defendant's counsel has urged in argument that the evidence establishes an insufficient demand of the acceptor and a want of proper diligence in notifying the drawer. Other matters also have been urged on behalf of the defendant, which we consider it unnecessary to discuss.

On the nineteenth of February, 1850, the defendant drew his draft upon William Laughlin & Co., of this city, in favor of C. J. Searls, for the sum of two thousand five hundred dollars, payable ten months after date. This bill, after acceptance, was in due course of business discounted by the Planters' Bank of Nashville, and was, by the officers of that institution, transmitted for collection to the Mechanics' and Traders' Bank of this city, where the acceptors resided. The bill is dated in New Orleans, though the drawer, it appears, resides, and did reside at the time the draft was drawn, in the parish of Carroll, in this state, to which place he removed from Warren county, in the state of Mississippi, the place of his previous residence.

On the maturity of the note, a presentment for payment was made at the place of business of the acceptors, by a notary public, who, finding it shut, made protest for non-payment, without making further inquiry for the residence of the acceptors, and on the same day sent notice of the same, by mail, to the president of the bank of Nashville, inclosing in the same letter the notices for the other parties to the bill. These notices were received in due course of mail, on the sixth of January, 1851, by the officers of the bank, who, after diligent inquiry made of several persons, and especially of the party from whom they had received the bill, being unable to obtain any positive information with reference to the defendant's place of residence, on the same day on which they themselves received notice,

deposited the original and duplicate notices of protest in the post-office at Nashville, directed separately to the defendant at five different post-offices in the state of Mississippi, being those at which they supposed they would be most likely to reach the defendant.

Now, it remains to be determined under this state of facts: 1. Whether a proper presentment and demand of payment was made by the notary; 2. Whether the notary took the customary and legal steps for giving notice of protest to the other parties to the bill; and 3. Whether the plaintiff used due diligence in attempting to give notice to the drawer.

We consider a demand made within the usual business hours, at the commercial domicile of a partnership, for the payment of a note or bill due by the firm, a sufficient presentment. It was not necessary to make a further demand at the private residence of the individual partners. The place of business is the domicile of the firm, and it is their duty to have suitable persons there to receive and answer all business demands made at that place. We express no opinion as to the degree of diligence requisite where the obligation is that of one doing business alone, and where the debtor has both a domicile and place of business, the latter being closed at the time of the presentment: See Story on Prom. Notes, sec. 235.

We think the notary, under the circumstances, complied strictly with commercial usage in giving notice exclusively to the last indorser.

Mr. Chitty lays down the rule as follows: "It is usual for the holder only to give notice to the person from whom he immediately received the bill or note, especially if he is ignorant of the residence of the other parties, as in the case at bar; and if so, his neglect to give notice to the other prior indorsers and to the drawer cannot, on any sound principle, deprive either of the indorsers of the right to proceed against the person who indorsed to him and all prior parties; provided he, in his turn, has duly forwarded notice." The rule is therefore clearly settled, that each party to a bill or note, whether by indorsement or mere delivery, has in all cases until the day after he has received notice to give or forward notice to his prior indorser, and so on until the notice has reached the drawer:" See Story on Prom. Notes, sec. 331, and notes.

And where the distance is such as to require an interval of several days for the purposes of communication, then "the day" which each indorser is allowed within which to give his notices

in turn will commence with that on which he himself receives notice. The notary testifies in this case that he was ignorant of the residence of the drawer, and that the office of the acceptors, where such inquiry might have been made, being shut, he directed the notices according to the law and usage in such cases. For a further illustration of this subject, see the opinion of Chief Justice Slidell in the case of *Carmena v. Bank of Louisiana*, 1 La. Ann. 370.

Up to the time, therefore, that the bank of Nashville received notice of protest there had been no discharge of the drawer. Were its officers guilty of any such laches, after that notice had been given, as operated a release of his liability? It appears to us that they used all reasonable diligence in endeavoring to discover the residence of the defendant. The indorsee of the note from whom they received it gave them no information. They were not bound to make public proclamation, or to go to the useless expense of advertising for information concerning the residence of one whose domicile was in another state.

The doctrine on this subject is clearly and concisely stated in 3 Kent's Com., sec. 44, p. 105, from which we extract a single sentence, as specially applicable to this case: "The law does not presume that the holder of the paper is acquainted with the residence of the indorsers; and if the holder or notary, after diligent inquiry as to the residence of the indorser, cannot ascertain it, or mistakes it, and gives the notice a wrong direction, the remedy against the indorser is not lost."

It has not been suggested, and we are at a loss to conceive, what further inquiries, with any reasonable hope of obtaining additional information, the officers of the bank could have made.

We think there is no error in the judgment appealed from.

Judgment affirmed.

DEMAND OF PAYMENT OF NEGOTIABLE INSTRUMENT AT MAKER'S RESIDENCE REQUIRED, WHEN: *Anderson v. Drake*, 7 Am. Dec. 442; *Woodworth v. Bank of America*, 10 Id. 239; *Galpin v. Hard*, 15 Id. 643, and as to presentment and demand generally, see notes to *Dupré v. Richard*, 43 Id. 221, and *Taylor v. Snyder*, 45 Id. 487; *Wesson v. Garrison*, 58 Id. 674, and cases in note 675, 676; that presentment must be made during business hours, see *Wallace v. Gwin*, 35 Id. 202.

INDORSER IS ENTITLED TO ONE DAY AFTER HE RECEIVES NOTICE within which to transmit the same to his prior indorser: *Stephenson v. Dickson*, 62 Am. Dec. 369, and cases referred to in note 372; also *Carter v. Bradley*, 36 Id. 735.

NON-RESIDENCE OF MAKER, HOLDER, OR INDORSER of negotiable instrument. Demand on or notice to: See *Hepburn v. Toledano*, 13 Am. Dec. 345, note 346; *Taylor v. Snyder*, 45 Id. 457.

IN *WISEMAN v. CHIAPPELLA*, 23 How. 370, AFTER CITING PRINCIPAL CASE to the point that as against a partnership want of demand is excused when the bill is presented at the commercial domicile within the usual business hours, the court says that in the main case the opinion was reserved as to cases where a person does business alone, and has a dwelling, as well as a place of business which is found closed, and that they have sought in vain for any authority to sustain a distinction between bills accepted by a firm and those accepted by individuals; that this distinction seems to them to be quite a novel doctrine in the law of bills and notes.

TRESKA v. MADDOX.

[11 LOUISIANA ANNUAL, 206.]

IN ACTIONS OF LIBEL, MALICE IS OFTEN IMPLIED. Rule at common law being that if the words spoken or published are in themselves actionable, malicious intent is an inference of law, and needs no proof. Malice does not mean spite against the individual, but a wanton disposition grossly negligent of the rights of others.

LIBEL.—PARTY HAS RIGHT, AS CHRONICLER OF EVENTS that actually occurred, to report the fact that another has been arrested and held for examination upon a particular charge; but beyond this he cannot go, and assume the guilt of another upon an *ex parte* charge, except upon the responsibility of proving the truth of his accusation when sued for libel.

LIBEL.—REPARATION MADE BY RECANTING CHARGES the day after they were made cannot exonerate the party entirely, but may properly be considered by the jury in estimating the amount of damages.

LIBELED PARTY MAY RELEASE HIS CLAIM FOR DAMAGES, BUT BARE EXPRESSION OF SATISFACTION at an apology and recantation will not operate a release of the right of action.

IN ACTIONS OF LIBEL, DAMAGES CAN BE GIVEN WITHOUT SPECIAL PROOF of the pecuniary amount suffered, where the libel is not published by the party himself, but through one of his employees in the regular course of his employment, and for whose act the principal is legally responsible.

IN ACTIONS OF LIBEL, CIVIL AS WELL AS CRIMINAL, JURY ARE JUDGES OF BOTH LAW AND FACTS.

IT IS DUTY OF JUDGE IN ALL CASES to give the jury a knowledge of the definitions and principles of law applicable to the case, and under the statute of Louisiana, in all appealable cases, the judge may be required by counsel to charge the jury in writing, they having the power to disregard his instructions.

APPEAL from the fifth district court of New Orleans. The facts of the case are stated in the opinion.

Rand and Bartlette, for the plaintiff.

Durant and Hornor, for the defendant.

By Court, *SPOFFORD, J.* The defendant has appealed from a judgment for one thousand dollars, rendered against him upon

the verdict of a jury, as damages for the publication of a libel against the plaintiff in the Crescent newspaper.

The plaintiff, captain of a schooner in the Tampa bay trade, was arrested in New Orleans in July, 1852, and imprisoned upon an affidavit made by a policeman before one of the recorders, to the effect that he had been informed, and verily believed, that the plaintiff and others on board his schooner, the George Lincoln, were guilty of robbing the dead bodies of certain persons who had been killed by an explosion upon the steamboat St. James, and had been found floating upon the lake.

The defendant, proprietor of the Crescent newspaper, was not the writer, and perhaps was absent at the time. But one of his regular employees, having learned of the arrest of the plaintiff, and read the affidavit made against him before any examination was had, wrote and caused to be published in the defendant's paper the exaggerated and inflammatory article which constitutes the libel in question.

This article assumes and proclaims the guilt of the plaintiff, and going far beyond the affidavit really made, treats of his general character and history as that of a noted criminal. It speaks of his "suspicious-looking schooner known to be manned by some nurslings of crime long marked by the officers of the law;" and of her owner whom the captain of police "had known through long years for his piratical inclinations;" and adds that "a land and water rat was this skipper of the schooner, and a pet of criminal justice during many a day." Captain Tresca and his crew, described by name, are said to have come into port "flushed with successful booty, and bold through previous immunity," and to have been immediately arrested by the vigilant police; and Tresca especially is painted as "a brawny, thick-set, low-browed bandit, and to all appearances

'As mild a mannered man

As ever scuttled ship or cut a throat.'

The article created a sensation, as it was probably intended to do. And although it shortly turned out to be wholly unjustifiable and mostly untrue, it is proved to have caused the plaintiff the loss of some freight the next trip of his schooner. Upon the preliminary examination, there appeared to be no evidence to criminate him, and his reputation as an honest and inoffensive citizen was vindicated by subsequent articles in the Crescent, written by the employee who had penned the libel.

The answer of the defendant admits that he published the article charged as a libel, and admits that it was false.

By way of defense there is a denial of malice in the publication; an averment that the records of the recorder's court, of which it is customary for newspapers to make notes, had misled the defendant; that on discovering the error he had instantly retracted it publicly in his newspaper, and that the petitioner had expressed and confessed himself satisfied with the *amende*.

The first point relied upon by the defendant is that there was no malice in the publication. No express malice was proved. Indeed, it may be assumed that the defendant, when he made the publication, did not know who Captain Tresca was, and therefore could have had no special malice against him. But in actions of this character malice is often implied. At common law, if the words spoken or published are in themselves actionable (as, if they import an accusation of an indictable offense), malicious intent is an inference of law, and therefore needs no proof: 2 Greenl. Ev., sec. 418, note 4. In this case malice does not mean a spite against the individual, but *malus animus*, a wanton disposition, grossly negligent of the rights of others. We think the jury might properly have inferred such malice under the circumstances of the case: *Cauchoix v. Dupuy*, 3 La. 208.

As a chronicler of events that actually occurred, the defendant had a right to report the fact that the plaintiff had been arrested and held for examination on a particular charge. But he had no right to go beyond this, assume the guilt of the plaintiff upon an *ex parte* charge, heap accusations of other crimes upon his head, without any foundation, and vilify his character before the public, except upon the responsibility of proving the truth of his accusations when sued for libel. The tenor of the article in this case was to charge the plaintiff with the high crime of piracy. The defendant has not shown that he had any grounds to suppose such to have been, as charged, the occupation of the plaintiff, or that the charge was made with good motives and for justifiable ends.

The reparation made by recanting the charges, the day after they were made, was proper to be considered by the jury in estimating the amount of damages, but could not, as the appellant contends, exonerate him entirely. The injury had been done. *Vox semel missa non revertit*. The slander, circulated by one issue of the paper, could not be wholly obliterated by the recantation in another. All who saw the first may not have seen the last. And is it difficult wholly to restore a reputation thus positively and publicly accused of the highest crimes known to the law.

It is urged that the plaintiff is debarred from a recovery by the expression of his satisfaction at the apology and retraction published by the defendant. This is something like the plea of accord and satisfaction of the common law: 3 Bla. Com. 16. A bargain of this kind could be enforced under our law, as it is competent for the injured party to release his claim for damages. But it must appear that he has released it, or expressly agreed to waive his action for the consideration named. The proof here wholly fails to sustain the existence of such waiver on the part of the plaintiff, all his expressions being consistent with a reservation of his right to sue if he thought proper.

The defendant took a bill of exceptions to the refusal of the judge to charge the jury as follows: "1. If the jury think from the evidence that the publication was not made by Maddox maliciously, and with moral turpitude, then no verdict of damages can be given without special proof of the pecuniary amount suffered."

The court did not err, because Maddox, not making the publication personally, but through one of his employees in the regular course of his employment, for whose act he was legally responsible, might be and was wholly without moral turpitude in the affair, and yet damages could be given without special proof of the pecuniary amount suffered. In estimating damages for offenses and *quasi* offenses, much discretion is left to the jury.

The second instruction asked and refused was: "That in all cases where the law gives the individual an action of damages he has the right to take in compensation such satisfaction as may be agreeable to himself and not forbidden by law; and if the jury think from the evidence that the plaintiff Treska expressed himself satisfied with the apology and public retraction of the charges made against him, then in law the plaintiff has had reparation for his injury, and is not afterwards entitled to an action of damages."

We think there was no error in refusing this charge, because a bare expression of satisfaction at the apology and recantation would not operate a release of the right of action. The expression might have been made without any intent or agreement of the parties to that effect, and then would not bar the action. We have clearly stated that we think it was made without any such intent or agreement.

The judge therefore ruled correctly, although we think the reason given by him for his ruling was unsatisfactory. He stated that the act of the twenty-ninth of January, 1847 (Acts,

28), declaring that the jury shall be the judge of the law and the facts in all prosecutions for libel, dispensed him from charging the jury upon the law at all. If this statute refers to civil actions for libel, which seems doubtful, it does not exonerate the judge from the duty of giving the jury a knowledge of the law applicable to the case. In all cases, civil as well as criminal, the jury are judges both of the law and the facts: Code Proc. 520; *Bostwick v. Gasquet*, 10 La. Ann. 81; *State v. Ballerio*, 11 Id. 81.

But in all appealable cases the judge may be required by the counsel of either party to charge the jury in writing: Acts 1855, 800; Bull. & Curry's Dig. 525.

In all cases it is his duty to give them a knowledge of the definitions and principles of law applicable to the case. They have the power to disregard his instructions, but in practice they seldom do. They are not presumed to know the law, or to be able to judge unaided between the conflicting doctrines invoked and advocated by counsel. The stability and uniformity of the administration of justice require that a learned and impartial judge should enlighten jurors as to the rules of law which, in his view, are essential to a just decision of the cause before them.

The exceptions, however, were only taken to the refusal of the judge to charge as requested. As we find no error in that refusal, it is unnecessary to remand the cause.

Complaint is made of the amount of the verdict. It was not made a ground of the motion for a new trial that the verdict was excessive. Considering the enormity of the libel, the absence of any reasonable justification for it, the excitement it created in the public mind against the plaintiff, the injury done to his feelings and his social position, we do not think we are justified by the precedents in disturbing the verdict: See *Daly v. Van Benthuyzen*, 3 La. Ann. 69.

Judgment affirmed.

MERRICK, C. J., absent.

MALICE IS PRESUMED from the publication of a libel: *Kang v. Scott*, 21 Am. Dec. 102, and note 114; *Bodwell v. Osgood*, 15 Id. 228; *Usher v. Severance*, 37 Id. 33; *Hart v. Reed*, 35 Id. 179; *Smith v. Ashley*, 45 Id. 216.

JUSTIFICATION OR EXCUSE FOR PUBLICATION OF LIBELOUS MATTER: *State v. Burnham*, 31 Am. Dec. 217, and note 224, collecting cases.

LIABILITY OF PROPRIETOR OF NEWSPAPER EDITED BY ANOTHER for libel published without his knowledge: *Andres v. Wells*, 5 Am. Dec. 267.

JURY JUDGES OF LAW AND FACT in actions of libel: *State v. Allen*, 10 Am. Dec. 687; *Van Vechten v. Hopkins*, 4 Id. 339, and valuable note 351; *Usher v. Severance*, 37 Id. 33.

IT IS DUTY OF JUDGE to declare to the jury what the law is: *Keener v. State*, 63 Am. Dec. 269; *Lincoln v. Wright*, 62 Id. 316.

THE PRINCIPAL CASE WAS CITED AND APPROVED in *Perret v. New Orleans Times Newspaper*, 25 La. Ann. 174-176, 178, 179, to all of the points contained in the first five sections of syllabus, *supra*; and it was there said that the case then under consideration bore a close resemblance to the principal case in most respects; and it was again cited in *Cass v. New Orleans Times*, 27 Id. 219, to the point that in an action of libel proof of damage from the publication is not necessary to recover; on page 223 it is distinguished by Morgan, J., in his dissenting opinion.

MOCK v. KENNEDY.

[11 LOUISIANA ANNUAL, 625.]

STATE COURT MAY ENJOIN UNITED STATES MARSHAL from levying an execution from a federal court on the property of a person not named in the writ.

MARRIED WOMAN HAS RIGHT TO JUDGMENT OF SEPARATION OF COMMON PROPERTY upon proof of the insolvency of her husband, and that she is possessed of skill and industry sufficient to earn a separate livelihood, which she has exercised.

APPEAL from the fifth district court of New Orleans. The opinion states the case.

G. and C. E. Schmidt, for the plaintiff.

A. G. Semmes, for the defendant and appellant.

By Court, LEA, J. In this case the plaintiff has proved that the judgment decreeing a separation of property between her husband and herself was based upon sufficient considerations in law and fact. It is shown that at the date of her marriage with Rose, she had a separate industry and a considerable amount of property; that after the marriage Rose took possession of her effects, and that he afterwards became insolvent, and was sued by several of his creditors. These facts, which have been established by evidence taken contradictorily with the defendants, justified the application for a separation of property and the decree maintaining it. We think, moreover, that the evidence fully establishes the plaintiff's right of property in the goods seized.

The stock of merchandise appears to have been purchased originally with funds borrowed upon her credit, and lent to her

individually. The store was not only carried on in her name, but was managed by her, and supported by her personal credit and at her individual responsibility. The evidence in support of these facts was satisfactory to the district judge, and we are unable to say that his conclusions were erroneous.

This view of the case brings us to the consideration of the exception taken to the jurisdiction of the court, on the ground that a state court has no right to enjoin the execution of a writ emanating from a federal tribunal. The question presented is one of title, which is wholly independent of the proceedings in the federal court. Every court, whether state or federal, has, as a general rule, an exclusive control over the enforcement of its own process, except so far as it is subject to the revision of an appellate tribunal. This court cannot inquire into the validity of the judgment upon which the execution issued, or the validity of the execution itself. But the plaintiff, without inviting an inquiry into the validity of these proceedings, to which she is not a party, invokes the protection of the court against an illegal seizure of her property, made by the officer charged with the enforcement of the writ of execution against a third person. She tenders an issue of title which has no connection whatever with the proceedings had in the federal tribunal. This question, we think, the state tribunal may lawfully examine and determine, as it involves no conflict of jurisdiction. The writ emanating from the federal court commands the marshal to seize property belonging to the defendant in execution. The decree perpetuating the injunction commands the marshal to abstain from the commission of a trespass by the seizure of property which does not belong to the defendant in execution.

The legal doctrine governing such a case is concisely expressed in 1 Kent's Com. 411. "If the officer of the United States who seizes, or the court which awards the process to seize, has jurisdiction of the subject-matter, then the inquiring into the validity of the seizure belongs exclusively to the federal courts; but if there be no jurisdiction in the instance in which it is asserted, as if a marshal of the United States, under an execution in favor of the United States against A, should seize the person or property of B, then the state courts have jurisdiction to protect the person and the property so illegally invaded." For a further illustration of this subject, see *Slocum v. Mayberry*, 2 Wheat. 1; *Bruen v. Ogden*, 6 Halst. 370 [20 Am. Dec. 593]; *Robb v. Wagner*, 5 La. Ann. 111; also *Dunn and Wife v. Vail*, 7 Mart. 416 [12 Am. Dec. 712].

We find the evidence too vague and unsatisfactory to constitute a proper and sufficient basis for a decree awarding damages; the plaintiff's right to recover damages should, however, be reserved.

It is ordered that the judgment appealed from be amended so as to read as follows: It is ordered that the injunction herein sued out be maintained and made perpetual; that upon the plaintiff's claim for damages there be judgment, as in case of nonsuit. It is further ordered that the costs of suit in the district court, together with the costs of this appeal, be paid by the defendants and appellants.

SAME CASE ON A REHEARING.

By Court, LEA, J. In this case the only question is whether the judgment for a separation of property, obtained by the plaintiff against her husband, is valid or not. It is to be remarked that the wife is not seeking to enforce any moneyed claim upon her husband's property adversely to his creditors; if this were the case, it would be incumbent upon her to establish affirmatively the validity of such claim; but the question presented is one of title. Does the property seized in execution belong to the plaintiff as her separate property or not? If the judgment of separation is valid, it is her property; for it has been acquired by her, in her own name and upon her personal credit, since the date of the judgment. Every one of the witnesses who knew the plaintiff prior to her marriage with Rose testifies to the fact that she had a separate industry. She kept a clothing store. Now, it matters not whether her husband took possession of this store or not; it is equally immaterial whether she had or had not property at the time of her marriage, so far as this liquidation is concerned, as she is not seeking to enforce a paraphernal claim. It is sufficient for a married woman to prove that she had the skill and industry to earn a separate livelihood, which she had exercised, whether as a seamstress, teacher, milliner, or (as in the case at bar) a shop-keeper is not material; she is entitled, under the humane spirit of our jurisprudence, upon proof of this fact, accompanied by proof of the insolvent condition of her husband's affairs, to call upon the court, by a judgment of separation, to protect the fruits and earnings of her separate industry from being squandered by her husband or seized by his creditors: See *Davock v. Darcey*, 2 Rob. (La.) 343.

Rehearing refused.

WIFE HAS RIGHT TO OBTAIN SEPARATION OF PROPERTY, though she has brought no dowry, and has no actual claims against her husband, when his affairs are in an embarrassed condition: *Webb v. Bell*, 24 La. Ann. 76, citing the principal case as reaffirming the prior decisions in Louisiana on that point; and in *Daly v. Sheriff*, 1 Woods, 177, the principal case is cited and affirmed as to the first section of syllabus, *supra*.

SPEARS v. SHROPSHIRE.

[11 LOUISIANA ANNUAL, 559.]

RULE THAT SETTLEMENT BONA FIDE MADE BEFORE AND IN CONTEMPLATION OF MARRIAGE IS GOOD against the husband and his subsequent creditors and purchasers, applies to cases where property is settled on the intended wife by the intended husband, and is yet more inflexible in cases where the intended wife, with the knowledge of her intended husband, secures her own property to her own use and that of her children.

SECOND MARRIAGE CONSUMMATED IN MISSISSIPPI IS BINDING IN LOUISIANA, although the first marriage was void by the law of Mississippi, the husband having at that time a wife living, but from whom, before the second marriage, he had been divorced.

CONTRACT IS GOVERNED BY LAW OF STATE WHERE MADE, WHEN ALL OF PARTIES to it reside in and it was intended to have effect in that state.

APPEAL from the district court of East Feliciana. The opinion states the case.

Smith, and Smiley and Perin, for the plaintiff.

Muse and Sharkey, for the defendant and appellant.

By Court, BUCHANAN, J. This case was before us last year, and was remanded for the admission of a certain marriage settlement, which had been rejected by the district court: See 10 La. Ann. 218.

The plaintiff had judgment in the court below for the slaves mentioned in her marriage settlement and their increase. There was judgment against her on her money claim. Defendant appealed and plaintiff has joined in the appeal, claiming that the judgment be amended so as to conform to the prayer of the petition.

We were of opinion, when the case was previously considered by us, that the proceedings and decrees in Mississippi do not on their face show that the marriage settlement has ever been adjudged in Mississippi fraudulent and void. After the full argument that this point has received upon the present trial, we adhere to our opinion as then expressed.

The law of Mississippi is admitted to be, that a settlement, *bona fide*, made before and in contemplation of marriage, is good, not only against the husband, but against his creditors and subsequent purchasers, and that this rule which applies to cases where property is settled on the intended wife by the intended husband is yet more inflexible in cases where the intended wife, with the knowledge of her intended husband, secures her own property to her own use and that of her children.

But it is contended that the plaintiff cannot claim the benefit of this rule of law, because: 1. This was not a settlement, *bona fide*, in contemplation of marriage; inasmuch as the parties were man and wife at the time of the settlement, and for years before; and 2. Because the property conveyed was not in truth the property of plaintiff, as alleged in the settlement, but was really the property of defendant, having been paid for by him.

The evidence shows that the first marriage of these parties, in 1829, was null by the laws of Mississippi—Shropshire being, at the time of such marriage, already married to a woman who was still living in Tennessee, from whom he was not divorced: Hutchinson's Miss. Code, 495, sec. 4; *Smart v. Whaley*, 6 Smed. & M. 308. But a divorce had taken place between Shropshire and his first wife previous to the contract of marriage with plaintiff of October 2, 1832. The second marriage was therefore binding.

It seems probable from the evidence that the greater part of the shares mentioned in the deed of trust or marriage settlement, although charged to Mrs. Spear by previous deeds from Wren, and from Gayslen and Wren, had been paid for in reality by Shropshire. If so, the settlement, instead of being made by the plaintiff, must be viewed as made by the defendant Shropshire, who was a party to the deed; and such a settlement appears to be valid, by the law of Mississippi, against subsequent creditors: See case of *Wells v. Treadwell*, 28 Miss. 717, decided by the high court of errors and appeals of Mississippi, at the April term, 1855, referring to *Laurissini v. Corquette*, 24 Miss. 181 [57 Am. Dec. 200], and *Bland v. Muncaster*, 25 Id. 66 [57 Am. Dec. 162]; *Armfield v. Armfield*, 1 Miss. Ch. 316.

The contract in question was executed in Mississippi, where all the parties resided, and was intended to have effect there. Its effect must, therefore, be governed by the law of Mississippi: Civil Code, art. 10.

We find no error in the judgment of the district court reject-

ing the claim of plaintiff on account of money received by her husband for land sold in Mississippi.

Judgment affirmed with costs.

MERRICK, C. J. I have recused myself in this case, and take no part in the decision.

MARRIAGE SETTLEMENT VALID UNDER LAWS OF STATE WHERE EXECUTED, and where the property affected thereby is situated and the parties resided, is not affected by the removal of the parties thereto to another state: *Young v. Templeton*, 50 Am. Dec. 563, note 572; *Murphy v. Murphy*, 12 Id. 475, note 478; and as to validity of marriage settlements as to creditors, see *Merritt v. Scott*, Id. 371, 375; *Satterthwaite v. Emley*, 43 Id. 620; *Givens v. Branford*, 13 Id. 702, note 706.

MARRIAGE VALID BY LAW OF PLACE WHERE CELEBRATED is valid everywhere, and if invalid there is invalid everywhere: *Phillips v. Gregg*, 36 Am. Dec. 158, and cases collected in note thereto 166; *State v. Patterson*, 38 Id. 699; *True v. Ranney*, 53 Id. 164, note 167.

CONTRACT IS TO BE GOVERNED AND CONSTRUED by the *lex loci contractus*, unless another place is appointed for its performance: *Young v. Harris*, 61 Am. Dec. 170, and cases in note 172.

STATE v. SMITH.

[11 LOUISIANA ANNUAL, 633.]

STATUTE OF LOUISIANA AGAINST CARRYING CONCEALED WEAPONS does not contravene the second article of the amendments of the constitution of the United States. The arms there spoken of are such as are borne by a people in war, or at least carried openly.

PARTIAL CONCEALMENT OF WEAPON is a violation of statute defining as concealed any weapon carried by a person, not appearing in full open view.

APPEAL from the district court of the parish of Claiborne. The opinion states the case.

George, for the defendant and appellant.

The record does not show who appeared for the state.

By Court, MERRICK, C. J. The defendant was indicted and convicted of carrying concealed weapons. He takes the present appeal to reverse the charge of the judge to the jury. The language used in the charge and excepted to is, "that carrying of a pistol in the pocket under the clothes, although partially exposed, is the carrying of concealed weapons, within the meaning of the statute."

The charge is objected to: "1. Because it is a direct charge upon the facts of the case; and 2. An evident misinterpretation

of the statute." The charge was not a charge upon the facts, although the facts proved before the jury may have been similar. The judge charges upon the facts when he expresses an opinion upon what has been proved to the jury, or when he assumes a given state of facts as proved, and not where he expresses, as in this case, his opinion of the law arising from a state of things which may or may not have been established before the jury, and upon the proof of which he abstains from intimating any opinion. On the other branch of the case, we are not satisfied that the charge of the judge misled the jury as to the law of the case.

The statute against carrying concealed weapons does not contravene the second article of the amendments of the constitution of the United States. The arms there spoken of are such as are borne by a people in war, or at least carried openly. The article explains itself. It is in these words: "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." This was never intended to prevent the individual states from adopting such measures of police as might be necessary, in order to protect the orderly and well-disposed citizens from the treacherous use of weapons not even designed for any purpose of public defense, and used most frequently by evil-disposed men who seek an advantage over their antagonists, in the disturbances and breaches of the peace which they are prone to provoke. There is therefore nothing in the constitution of the United States which requires of us a rigorous construction or the statute in question.

The section of statute under which the indictment is framed is in these words: "Be it further enacted, etc., that whoever shall carry a weapon or weapons concealed on or about his person, such as pistols, bowie-knife, dirk, or other dangerous weapon, shall be liable to a prosecution by indictment or presentment, and on conviction for the first offense shall be fined not less than two hundred and fifty dollars nor more than five hundred dollars, or imprisonment for one month; and for the second offense not less than five hundred nor more than one thousand dollars, or imprisonment at the parish prison at the discretion of the court, not exceeding three months; and that it shall be the duty of the judges of the district courts in this state to charge the grand jury especially as to this section."

The offense created by this statute is the carrying of the weapon, pistol, bowie-knife, or dirk, etc., concealed on or about

the person. By the first section of the act of 1813, a weapon of the kind designated was defined as concealed when, being carried by a person, it did not appear in full open view: Acts 1813, p. 172, sec. 1.

A partial concealment of the weapon, which does not leave it in full open view, is a violation of the statute. The judge, in the single expression in his charge to the jury excepted to, does not fully explain himself, yet we think a fair construction of his language does not imply more than is here expressed. He says the carrying of a pistol (a weapon designated by the statute) in the pocket or under the clothes, although partially exposed, is the carrying of a concealed weapon. We must understand the district judge as speaking of weapons as ordinarily worn, and where the partial exposure is the result of accident or want of capacity in the pocket to contain, or clothes fully to cover, the weapon, and not to the extremely unusual case of the carrying of such weapon in full open view, and partially covered by the pocket or clothes. We cannot say, from the single expression of the charge excepted to, that such error has intervened on the trial of this case as to require us to reverse the judgment.

Judgment affirmed.

STATUTE PROHIBITING CARRYING OF CONCEALED WEAPONS is constitutional: *State v. Chandler*, 52 Am. Dec. 599; *State v. Reid*, 35 Id. 44, and note 51; *State v. Jumel*, 13 La. Ann. 400, citing the principal case.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

WOODWARD v. COWING.

[41 MAINE, 9.]

EQUITY HAS JURISDICTION OF SUITS BETWEEN PARTNERS, BUT NOT BETWEEN CO-TENANTS, for the settlement of their affairs, and an association must be shown to be a partnership to give equity jurisdiction of such a suit.

EACH PARTNER HAS COMPLETE JUS DISPONENDI of the whole of the partnership effects.

SUBSCRIBERS TO ERECT MEETING-HOUSE CONSTITUTE CO-TENANCY, AND NOT PARTNERSHIP, where they agree to pay the sums severally subscribed, the property of each in the house when erected to be in proportion to his subscription, and the whole to be sold on such terms as the majority shall approve; and a subscriber cannot maintain a suit in equity against his associates to adjust their respective liabilities where he has paid more than his share.

BILL in equity by a member of a certain association against his associates to obtain an equitable adjustment of their affairs. The facts are sufficiently stated in the opinion.

W. G. Barrows and S. Fessenden, for the complainant.

Shepley and Dana, for the respondents.

By Court, TENNEY, C. J. The complainant seeks relief from this court, as having power to hear and determine in equity all cases of partnership when the parties have not a plain and adequate remedy at law.

That the court may be clothed with jurisdiction, the parties before us must sustain to each other the relation of partners, and the association of the several individuals must constitute a partnership in law. If the parties are joint owners or tenants in common, having a distinct or independent interest in the

property, although that interest is undivided, and neither can transfer or dispose of the whole property, or act for the others in relation thereto, but merely for his own share, and to the extent of his own several right, they are not copartners, and this court has no power as a court of equity to determine their case: R. S., c. 96, sec. 10; Story on Part., sec. 89.

It is settled that in a partnership each partner in ordinary cases, and in the absence of fraud on the part of the purchaser, has the complete *jus disponendi* of the whole partnership interest, and is considered to be the authorized agent of the firm. He can sell the effects, or compound or discharge the partnership debts: 3 Kent's Com., lect. 43; *Knowlton v. Reed*, 38 Me. 246.

The parties to this bill, and others, associated together for the purpose of erecting a meeting-house to be occupied by the East Brunswick Baptist church and society; and in writing they each agreed and promised to pay the sum set against their respective names. The subscribers were to choose from their own number a committee of three, whose duty was declared therein to be to contract for the building of the meeting-house, which on being completed was to be the property of the subscribers in proportion to the amount invested by each individual, and to be offered for sale on such terms as the majority of the subscribers should determine.

The subscribers having severally promised to pay each a certain sum, amounting together to the sum of twelve hundred dollars, met together and chose a moderator, a clerk, a treasurer, and a building committee, consisting of five of their number; and the clerk made a record of the doings at that meeting, and of future meetings which were called and held from time to time, until some time in the year 1853. The building committee made a contract in behalf of the subscribers with A. C. Raymond to erect and finish the meeting-house above the underpinning, which seems to have been done by the subscribers themselves, or others. The house was completed so that the same was accepted at a meeting holden on June 24, 1848, by the subscribers to the contract, as appears by their records. Many of the pews were sold in pursuance of authority from the subscribers, but the avails were insufficient to cover all the expenditures in the erection and completion of the house. Several of the subscribers paid more than the sum promised, and others did not pay the full amount subscribed. The complainant alleges that he has expended in and about the erection and completion of the house a large amount beyond the subscription; and in

this bill he seeks an adjustment of the respective claims on account of payments made by him and other subscribers, more than the sums promised by each, with each other, and with those who have paid less than the sums severally subscribed. It is insisted, however, by the defendants, that it was in furtherance of the contract with Raymond, and on his credit, that the complainant paid much of the money alleged to have been expended by him, and not on the credit of the other subscribers; and that they have never promised, or in any way become liable, to pay a greater amount than that severally subscribed by them.

Attempts were made by the complainant and others of the associates to adjust their respective claims at meetings called for that purpose, but without success, many of them declining to do anything promotive of that object, professing, however, to be in "readiness to pay if the others will."

On examination of the subscription contract, which is the basis of the association, and which does not appear to have been abandoned at any time after its inception, it is manifest that the meeting-house was designed to be held by those who should contribute funds for its erection, and for finishing the same as owners in common, and not as a copartnership. The building of the house was the object which the subscribers sought; but they were to own in proportion to the amount of their investment, and the whole could be sold only on such terms as the majority of the owners should approve; therein withholding from each the authority to act for the others. The parties have conformed to this principle, which they adopted at the beginning, and no one has attempted to act for the others as a partner could act for the firm. But failing to unite in any measures for the purpose of reconciling their difficulties, the complainant has invoked the aid of this court as a court of equity. We think the jurisdiction is not conferred by the statute, and it is to that alone that it must look for its authority.

Bill dismissed with costs.

RICE, CUTTING, GOODENOW, and HATHAWAY, JJ., concurred.

PARTNER'S POWER OF DISPOSAL OVER FIRM PROPERTY: See *Egberts v. Wood*, 24 Am. Dec. 236; *Deckard v. Case*, 30 Id. 237; *Arnold v. Brown*, 35 Id. 296; *Tabley v. Butterfield*, Id. 374; *Pike v. Bacon*, 38 Id. 250, and cases cited in the notes thereto.

FICKETT v. SWIFT.

[41 MAINE, 65.]

DECLARATIONS OF PARTY TO RECORD, OR ONE IDENTIFIED WITH HIM in interest, are competent evidence against such party.

PARTNER'S DECLARATIONS ARE EVIDENCE AGAINST COPARTNER in an action against the latter upon a partnership liability.

NONSUIT IS IMPROPER WHERE QUESTION OF FACT ARISES upon the evidence within the province of the jury to decide.

CONTRACT IS WITHIN STATUTE OF FRAUDS WHICH IS FOR DELIVERY, AND NOT MANUFACTURE and delivery, of certain articles, such contract being a contract of sale.

ASSUMPSIT for a balance due against the defendant as part owner of a certain vessel. The opinion states the case.

Willis and Son, and W. P. Fessenden, for the defendant.

Shepley and Dana, for the plaintiff.

By Court, CUTTING, J. The plaintiff claims a balance to be due him "on account of blocking the defendant's ship." It appears from the testimony of George W. Cutter that he was engaged by the owners to superintend the building of the ship in 1853 and 1854; that her keel was laid in June of the former, but the vessel was not completed until the latter year, and after her arrival in New York; that Ambrose Scammon & Co. commenced building, who hypothecated her to the defendant in July, 1853, and in November of that year transferred one half to the defendant and one George H. Blanchard, and in January, 1854, the other half, by bills of sale, the purchasers giving bonds to reconvey upon certain conditions; that after this the witness continued, as agent for those interested, in making contracts for the work to be done and materials to be furnished, and had the general oversight; that while so acting he received directions from those interested in the ship; that some time in the spring or summer of 1853 he made a contract with the plaintiff to furnish the blocking, which was received the latter part of 1853 and first part of 1854; that the defendant and Blanchard had given him directions as to the manner of completing the ship after their interest in her was acquired; that the defendant wanted witness to draw on him for as small amounts as he could towards paying the bills at the eastward against the ship before getting her to New York, where he said he could more readily obtain money, and promised then to let him have money to settle some bills which were to be paid as

soon as the ship was ready for sea, among which was the plaintiff's; that when he made the contract with the plaintiff in 1853 he was the agent for the owners, and was acting in such capacity; that it was a part of the agreement on the part of the defendant and Blanchard, when they took the bill of sale, that they were to furnish what money was wanted to settle the bills against the ship; that all the bills, except those in New York, were contracted in the name of Scammon & Co.; that he don't know as Swift & Co. authorized him directly to make contracts with any one; that after they became interested in the vessel they knew he was acting as agent for her, and dealt with him as such, giving directions as to the manner in which they wished her to be completed.

The plaintiff then produced the bills of sale testified to by Cutter, which were made to Frederick Swift and George H. Blanchard, "composing the firm of Frederick Swift & Co." Also the letter of Swift & Co. to the plaintiff, of December 9, 1853, of which the following is an extract:

"We have wrote you in regard to sending us some blocks, which our Mr. Blanchard was speaking to you about when in Portland, and a short time since sent you an order for the same, and have not heard that you were in the land of the living."

Stephen C. Munsey testified that he made the sails for the ship under contract with Cutter, acting as the agent for Scammon & Co., on June 28, 1853; that in August of that year he gave a schedule of what he wanted to Swift & Co., who were represented by Blanchard; that after he got through he asked Blanchard if Swift & Co. owned any part of the ship, who replied, "We own the top of the ship;" said they were going to furnish the top, the outfit, and everything beyond the hull.

The foregoing is the substance of the evidence introduced by the plaintiff, and which the presiding judge ruled insufficient to maintain the action, and ordered a nonsuit. A preliminary question arises as to the admissibility of Blanchard's acts and declarations. The letter of December 9, 1853, was admitted to be in his handwriting, and that he was the copartner of the defendant. And whether the copies of the bills of sale were admissible or not becomes immaterial, since their contents were disclosed by Cutter without objection. We assume it, then, to be proved that Blanchard was the partner of the defendant. And the general doctrine is, that the declarations of a party to the record, or of one identified in interest with him, are, as against such party, admissible in evidence. The law, in regard

to this source of evidence, looks chiefly to the real parties in interest, and gives to their admissions the same weight as though they were parties to the record: 1 Greenl. Ev., secs. 171, 180.

Upon the evidence legally admitted there arose a question of fact within the province of the jury to ascertain and determine, under proper instructions in matters of law, whether the defendant was liable for the price of the articles furnished. He would be so liable if there was any contract express or implied between him and the plaintiff. This may depend upon the fact whether Cutter was acting as the agent of Scammon & Co. solely in making the contract, or as the agent of the defendant as one interested in building the ship, or whether the defendant, as owner and furnisher of "the top," was not responsible for all necessary tackle and appendages. The presiding judge may have drawn the proper inferences and conclusions, and arrived at a correct result; but in so doing he encroached upon the province of the jury, who might have found the facts to have justified a different conclusion, without much danger of their verdict being set aside as against the weight of evidence.

The evidence presents another question which might possibly have authorized a verdict for the plaintiff. We refer now particularly to the letter of December 9, 1853.

Assuming, as the defendant contends, that the original agreement to furnish the blocks was made with Cutter as the sole agent of Scammon & Co., still, inasmuch as it was for the delivery, and not for the manufacture and delivery, of blocks which may have been manufactured at the time, it was a contract of sale, and is within section 4 of the statute of frauds, as was decided in *Hight v. Ripley*, 19 Me. 137.

Now, were the articles delivered before the date of that letter? or were they delivered subsequently, and in pursuance of the request therein contained? If the latter, then the defendant might have been liable under an implied contract. The evidence upon this point, as to the time of delivery, is somewhat conflicting. The account annexed purports to have been made on September 25th, and for a balance then due, which probably was at the date of the writ, September 25, 1854. Cutter testifies that "the blocking was received in the latter part of 1853 and the first part of 1854;" and the letter implies that at its date it had not then been received.

Exceptions sustained. The case to stand for trial.

TENNEY, C. J., and RICE, HATHAWAY, and GOODENOW, JJ., concurred.

DECLARATIONS OF PARTY TO RECORD, COMPETENCY OF: See *Davis v. Colvert*, 25 Am. Dec. 282; *Tenney v. Evans*, 40 Id. 194.

DECLARATIONS OF PARTNER AGAINST COPARTNER, COMPETENCY OF: See *Cochran v. Cunningham*, 50 Am. Dec. 186.

NONSUIT SHOULD NOT BE GRANTED WHERE THERE IS ANY EVIDENCE TO support a verdict: *Van Rensselaer v. Jewett*, 51 Am. Dec. 275; *Maxwell v. Harrison*, 52 Id. 385; *Tison v. Yawn*, 60 Id. 708, and notes thereto.

WORCESTER v. GREAT FALLS MANUFACTURING CO.

[41 MAINE, 153.]

DAMAGES ARE COMPENSATION FOR ACTUAL INJURY in actions *ex delicto*, and must be the natural and proximate consequences of the act complained of.

DAMAGES FOR LOSS OF POSSIBLE USE OF REALTY AS MILL PRIVILEGE by the wrongful overflowing of the same, where the plaintiff did not actually intend in good faith to make such use of it, cannot be allowed.

CASE to recover damages caused by the overflow of the plaintiffs' land and mill site. Verdict for the plaintiffs, stating the several items of damage separately in answer to certain questions submitted for their consideration. Judgment to be rendered on the verdict according to such rule of damages as may be laid down by this court. The opinion states the facts.

J. and R. Kimball, for the plaintiffs.

N. Clifford, J. W. Leland, and N. Wells, for the defendants.

By Court, TENNEY, C. J. The plaintiffs were the owners of certain land bordering on Salmon Falls river, where it is the dividing line between the states of Maine and New Hampshire, with a mill site and waterfall thereon in the same river. In September, 1848, the defendants erected a dam across that river below the land, mill site, and waterfall of the plaintiffs, and thereby wrongfully flowed out the same. The jury, in their verdict for the plaintiffs, assessed damages according to the injury which the plaintiffs had sustained and which they might have sustained on their different grounds; which verdict, by the agreement of the parties, is to be amended to accord with the rule of damages which shall be determined by the court.

The damages sustained by the plaintiffs on account of the flowing of their land by the defendants was the sum of eight dollars; and for the flowing out of their mill site and waterfall the additional sum of two dollars; and the sum of ninety-three dollars and sixty-seven cents was found as damages for the injury which the plaintiffs might sustain by being deprived of

the use of their mill privilege for any purpose for which it might have been used as a privilege or for sale. And the jury found further that neither at the time when the defendants' dam was erected, nor at any time since, did the plaintiffs intend in good faith to use and occupy their close as a mill privilege, by making and erecting suitable and proper dams and mills or other erections.

In actions *ex delicto*, the damages to be awarded by a jury are a compensation, recompense, or satisfaction to the plaintiff for an injury actually received by him from the defendant: Co. Lit. 257; 2 Bla. Com. 438 et seq.; 2 Greenl. Ev., sec. 253.

When the circumstances are ascertained, a compensation and satisfaction are to be awarded. The remedy is to be commensurate to the injury sustained: *Rockwood v. Allen*, 7 Mass. 254; *Bussy v. Donaldson*, 4 Dall. 207. All damages must be the result of the injury complained of: 2 Greenl. Ev., sec. 254. The damages to be recovered must be the natural and proximate consequence of the act complained of: *Id.*, sec. 256.

No rule has ever been recognized as having existence in law that a party can recover damages for being deprived of his real estate so that he cannot appropriate it for a certain imagined purpose, which might be attended with profit to him, when it is proved that he did not design so to use it; he may have damages for the injury actually sustained by being deprived of his land, but no further.

Damages, as we have seen, are given as a compensation for something the owner has lost previous to the commencement of his action, and not for that which he might have lost if he had devoted the property to a purpose which he never contemplated. The doctrine contended for by the plaintiffs' counsel would often make it advantageous to an owner of real estate capable of being beneficially improved, that he should be obstructed in his occupation of the same by a wrong-doer, when he had no design whatever of so improving it.

The sum of ninety-three dollars and sixty-seven cents found by the jury was for an injury purely hypothetical, having no basis in fact. No evidence was introduced for the purpose of showing that the plaintiffs wished to make sale of the mill site and waterfall, or that they could have done so, to be occupied by mills and other erections, and there is no foundation for damages on this account.

The damages which the plaintiffs actually sustained by the alleged injury to their land, mill site, and privilege have been

found to be the sum of ten dollars, and this sum they are entitled to recover, and the verdict is to be amended accordingly.

RICE, HATHAWAY, CUTTING, and GOODENOW, JJ., concurred.

COMPENSATION IS CENTRAL IDEA OF DAMAGES: See the note to *Austin v. Wilson*, 50 Am. Dec. 767.

NATURAL, PROXIMATE, AND LEGAL RESULTS ARE ALL DAMAGES that can be recovered: See *Harrison v. Berkeley*, 47 Am. Dec. 578; *Donnell v. Jones*, 48 Id. 59; S. C., 52 Id. 194; *Muldrow v. Norris*, 56 Id. 313; *Masterion v. Mayor of Brooklyn*, 42 Id. 38, and cases cited in the notes thereto.

HAMMOND v. WOODMAN.

[41 MASS. 177.]

GRANT OF PRINCIPAL THING CARRIES EVERYTHING NECESSARY to the beneficial enjoyment of the thing granted which the grantor has power to convey.

GRANT OF MILL CARRIES RIGHT TO FLUME OR RACE-WAY annexed thereto running through the grantor's land, necessary to its enjoyment.

GRANT OR RESERVATION OF EASEMENT IMPLIES AUTHORITY to do everything necessary to secure the enjoyment of it.

RESERVATION IN DEED OF "RIGHT TO TAKE AND USE WATER SUFFICIENT," "at all times," to drive a certain factory on the grantor's land, is as effectual as a conveyance of such right by the grantee to the grantor, especially where the grantee afterwards conveys the whole interest reserved to the grantor, and such right vests in a subsequent grantee of the residue of the grantor's land as an easement or servitude appurtenant; and such subsequent grantee may, when necessary to secure his right to "sufficient" water, cut off any spouts or conduits used by the prior grantee, whereby the quantity is diminished.

GRANT CANNOT BE IMPLIED OF RIGHT TO TAKE WATER FROM FLUME RESERVED TO GRANTOR on conveyance of part of a tract of land, merely because at the time of the grant a water-pipe was in use to convey water from said flume to mills or machinery on the part granted, where such use was not necessary to the enjoyment of what was granted.

DEED PURPORTING TO BE FOR CONSIDERATION CANNOT BE CONTRADICTION by the grantor by evidence that there was no consideration.

DEED IS EFFECTUAL WITHOUT CONSIDERATION between the parties to it.

MILLWRIGHT AND CIVIL ENGINEER IS COMPETENT AS EXPERT to give an opinion as to the effect upon the water in the factory flume and upon the machinery in the factory by opening and shutting gates conducting water therefrom, where he has been employed for many years in the construction of mills and factories.

CASE for cutting spouts conducting water to certain machinery of the plaintiff. Verdict for the defendants. Exceptions by the plaintiff to certain rulings and instructions, and a motion

to set aside the verdict as against evidence, etc., and to enter judgment for the plaintiff notwithstanding the verdict. The facts appear from the opinion.

N. Clifford and W. K. Kimball, for the plaintiff.

J. C. Woodman and Walton, for the defendants.

By Court, TENNEY, C. J. Prior to June 29, 1849, the South Paris Manufacturing Company were seised and possessed of certain real estate, situated on the east side of the Little Androscoggin river, and on the north and south sides of the road which crosses the same in South Paris. On the north side of the road were standing and in operation a grist-mill, saw-mill, and shingle-machine; and on the south side were situated the company's factory and other buildings connected therewith, also in operation. The only dam for the purpose of raising a head of water to work the mills and the factory was on the north side of the road, and above the grist-mill, saw-mill, etc. There was a protection wall on the easterly side of the river, running parallel therewith, evidently regarded as useful for the security of the mills and the factory against the operation of the water as it flowed down the river.

At the time referred to the factory was supplied with water from the dam, taken through a flume of considerable length, across the company's land above the road, and under the bridge across the river. In this flume spouts had been inserted, through which water had been taken to carry a corn-cracker in the grist-mill, and also the shingle-machine standing above the road.

On the day before named a deed to the plaintiff, and purporting to have been executed by the agent of the company, and who, it is insisted by the plaintiff, was duly authorized to make an effectual conveyance, was given of all the real estate belonging to the company which lay on the northerly side of the road, viz., the grist-mill, saw-mill, factory, store, shingle-machine, and all the apparatus and utensils thereto belonging. Then follows in the deed a description of the land by metes and bounds, with the exception of certain buildings standing thereon, but not of the land covered thereby. "Excepting also and reserving the right at all times to take and use water sufficient to drive the factory and machinery attached. Said Hammond is to maintain one quarter part of the dam across said river, and the bulkhead at the head of the grist-mill, and one quarter part of the protection wall; and the said company are to maintain

the bulkhead at the head of the factory flume, and one half of the dam across the river. Said Hammond is to use the water to drive his mills, and any machinery, at all times, until it comes down to the lowest place in the dam, as ascertained by the measurement of John Howe in the year 1848, and then the saw-mill is to stop. But he is also to have the right to use the water after that, so long as he can do it without impeding the speed and usefulness of the factory."

On November 20, 1852, the company conveyed to Woodman, True & Co. all the real estate owned by it at South Paris that lay on the east side of the river, and on the south side of the road, excepting, etc., bounded, etc., together with the buildings thereon, including the factory store, boarding-house, dry-houses, etc.; also all the machinery and manufacturing utensils and apparatus of every kind, pertaining to the manufactures there carried on, and now used, together with all the water privileges on the east side of said river owned by said company, subject to all duties, limitations, and restrictions pertaining to the same, as by the deeds of the same will appear, reference being had thereto; the grantees herein to keep reasonably tight flumes and gates used by them to prevent waste of water.

On the day of the date of the deed last referred to, the plaintiff and Albert M. Hammond conveyed to Woodman, True & Co. all their right, title, and interest in and to all the estate, real and personal, conveyed by the company, by deed of the same date, thereby conveying to the grantees their joint and several interest in the premises and property described in the deed of the company to the grantees.

The plaintiff alleges in his writ that he was seized of the interest conveyed by the company on the day of its deed to him, and so continued to the day of the commencement of his suit; and also that, since June 29, 1849, he has been accustomed to use the water running in the river by taking the same from the flume leading from the dam down stream under his grist-mill to the factory, by means of or through a penstock or water-spout, extending from said flume to his water-wheel, said wheel having been built for the purpose of carrying his shingle-machine, said wheel and shingle-machine being in use, in manner aforesaid, when the mills were conveyed to him; and he was further accustomed, since the time aforesaid, to take and use the water from the factory flume for the purpose of driving a corn-cracker, circular saw, and turning-lathe, being in his grist-mill and connected with a water-wheel standing under the same,

which wheel was driven by means of water, which the plaintiff had a lawful right to take, and has been accustomed to take from the factory flume, through a small flume adjoining thereto; and the plaintiff avers that he was lawfully seized of the right to take and use the water running in the river, in manner aforesaid, and for the said purpose, at all times without hinderance. Then follows the allegation that, on August 15, 1854, the defendants, unlawfully and without right, tore away the penstock or water-spout, and his said flume connected with the factory flume, and refused to permit the plaintiff to take and use the water running in the river for the use of his shingle-machine, and his machinery aforesaid, and has stopped up the passages for the flowing of said water from the factory flume upon the plaintiff's wheels, and has so kept the passages stopped to the time of the institution of this suit. The defendants severally plead the general issue, and in brief statements, with allegations in defense, deny the right of the plaintiff to insert in the factory flume the spouts and to draw water from the factory flume, which is alleged to belong to Woodman, True & Co. And it is also alleged that before the plaintiff's spouts were cut off from the factory flume he was requested to take the same away, but refused to do so.

Evidence was introduced by the parties upon the issues before the jury, and the judge instructed them that the deed of the company to the plaintiff, of June 29, 1849, conveyed to him in fee the real estate described, subject to the reservation, "excepting also and reserving the right at all times to take and use water sufficient to drive the factory and the machinery attached;" that the subsequent clause in the deed had reference to the use of the water by the grantee from the dam, and not from the factory flume; that the deed from the company, and the deed from the plaintiff to Woodman, True & Co., of November 20, 1852, conveyed to the grantees the fee in the real estate therein described, including the factory, together with the reservation in the first deed contained; and the reservation secured to Woodman, True & Co. the free and uninterrupted use and enjoyment of sufficient water at all times to drive the factory and machinery attached, and for such purposes they had the right to repair or rebuild, when necessary, the factory flume; that however convenient it might be for the plaintiff to use the water from the factory flume for propelling the wheels attached to his shingle-machine and corn-cracker, yet if the use of the water so taken from the flume as generally used by the plaintiff during the con-

tinuance of the old, and as contemplated by him generally to be used from the new, flume was detrimental in any practical degree to the operations of the factory, such use would be inconsistent with the free enjoyment of the reservation, and the defendants were justified in taking the spouts from the new flume, and preventing the plaintiff from inserting either spout therein. But if such was not detrimental in manner before stated, then the defendants were not justified in so doing, and would be liable to the plaintiff, etc.

The jury returned a verdict for the defendants, and they found also that it was practicable for the plaintiff to take water for his shingle-machine and corn-cracker wheels from either his saw-mill, grist-mill flume, or from the main dam, without interfering with the factory flume; and that such permanent alteration could be made for the sum of fifty dollars.

It is a well-settled rule of construction that the grant of a principal thing shall carry with it everything necessary for the beneficial enjoyment of that which is granted, and which the grantor has the power to convey: *Thayer v. Paine*, 2 Cush. 327.

"By the grant of mills the waters, flood-gates, and the like, that are of necessary use to the mills, do pass:" *Shep. Touch.* 89.

Where a party has erected a mill on his own land, and cut an artificial canal for a race-way through his own land, and then sells the mill without the land through which such race-way passes, the right to such race-way shall pass as a privilege annexed *de facto* to the mill, and necessary to its beneficial use: *Johnson v. Jordan*, 2 Met. 234 [37 Am. Dec. 85]; *Blake v. Clark*, 6 Greenl. 439; *New Ipswich Factory v. Batchelder*, 3 N. H. 190 [14 Am. Dec. 346]; *Nichols v. Luce*, 24 Pick. 102 [35 Am. Dec. 302]. Before the conveyance of the company to the plaintiff the flume to the factory had been prepared and used as the only mode of conducting the water to the factory for the purpose of driving the machinery therein; and it is not suggested that any other mode was referred to or contemplated by the parties; but the flume was treated in the deed as the passage-way of the water, which was to remain for the use of the factory. The dam above the plaintiff's mills and the protection wall were evidently designed to be for the common benefit of both parties to the deed; hence the propriety of their being kept up and in repair at the expense of both, though in unequal proportions, probably on account of the unequal value of the interests owned by each party respectively. The bulkheads at the heads of the grist-mill and the factory flumes were to be maintained in severalty, clearly indi-

cating that one was principally, if not exclusively, for the use of one party, and the other for the other. The deed of the company to Woodman, True & Co., of November 20, 1852, imposed upon the grantees the burden of keeping the flumes and gates used by them reasonably tight to prevent waste of water.

The factory flume—upon the examination of all the deeds in the case, to which the plaintiff is in effect a party, and from a construction to be given from an examination of all parts thereof—was a necessary part of the factory itself, and the right therein was reserved to the company, and passed to Woodman, True & Co. as appurtenant thereto: Co. Lit. 121 b, and 122 a; *Atkyns v. Clare*, 1 Vent. 407.

If a lessee for years of a house and land erect a conduit upon the land, and after the time is determined the lessor occupies them together for a time, and afterwards sells the house with the appurtenances to one, and the land to another, the vendee shall take the conduit and pipes, and the liberty to amend them: *Nicholas v. Chamberlain*, Cro. Jac. 121.

When the use of a thing is granted, everything essential to that use is granted also. Such right carries with it the implied authority to do all that is necessary to secure the enjoyment of such easement: *Prescott v. White*, 21 Pick. 341 [32 Am. Dec. 266]; *Prescott v. Williams*, 5 Met. 429 [39 Am. Dec. 688], and cases cited; *Pomfret v. Ricroft*, 1 Wms. Saund. 823, note 6.

The instruction to the jury that, for the purpose of the enjoyment of sufficient water at all times to drive the factory and machinery attached, Woodman, True & Co. had a right to repair or rebuild when necessary the factory flume, was legally correct.

The provision in the deed of the company to the plaintiff, touching his rights to the use of water at different conditions of the river, had reference to the amount secured to him of that which should be confined for the use of the mills and the factory, and not to the manner in which or the place from which it should be taken. The instruction, therefore, that the subsequent clause in the deed had reference to the use of the water by the grantee from the dam, and not from the factory flume, was strictly correct.

The reservation in the deed of the company to the plaintiff of the right at all times to take and use water sufficient to drive the factory and machinery attached, as between the parties thereto, is as effectual to secure to the company the right reserved, together with the easement and servitude so as to

charge the lands of the plaintiff, as by a deed from the owner of land to be charged, granting the same as appurtenant to other estate of the grantees: *Bowen v. Conner*, 6 Cus. 182. Especially must it be so here, where the plaintiff himself conveys by his own deed the whole interest reserved.

It is not perceived that the reservation referred to in the deed of the company to the plaintiff is any less strong in its effect than the right "to the free and uninterrupted use and enjoyment of sufficient water at all times to drive the factory and machinery attached." The principal thing secured is sufficient water at all times for the purpose expressed. If this were not free and uninterrupted in its enjoyment, it cannot be said that sufficient could be taken at all times.

The plaintiff's counsel, however, insists that as he had the right to drive his mills at all times until the water is reduced to the lowest place in the dam, as ascertained by the measurement of John Howe in the year 1848, the judge erred in informing the jury that the reservation secured to Woodman, True & Co. the free and uninterrupted use and enjoyment of sufficient water at all times to drive the factory and machinery.

It cannot be doubted that by the deed of June 29, 1849, it was the design of the parties thereto that the rights of the plaintiff should in some respects be subordinate to those of the company in the use of the quantity of water. When it was down to the mark made by Howe, the saw-mill was not permitted to run; manifestly for the reason that its running would retard the operations of the factory. And after the saw-mill had ceased to work, the plaintiff could use the water only so long as it did not impede the speed and usefulness of the factory.

But the grounds for allowing the plaintiff's mills and the company's factory to run at all times, when the water was above the mark in the dam, was undoubtedly that it had been satisfactorily ascertained that, until such reduction of the quantity of water in the dam, it was sufficient to drive all the machinery belonging to both parties, and at all times. At any rate, to give a reasonable construction to the deed, it must have been so understood by those interested at the time of its execution; and such supposed state of facts has not been attempted to be disproved.

It does not appear that the instructions to the jury upon this branch of the case were based at all upon any supposed controversy between the parties that the quantity of water taken by Woodman, True & Co. was or was not greater than that

which under the deeds they were entitled to use. The suit is certainly not for the defendants' having taken a greater amount of water than was secured to them, or for preventing the plaintiff from using, at all times, the amount of water which belonged to him; but it is for preventing him from taking it from the factory flume through his spouts, and cutting the spouts off therefrom, without regard to the quantity of water so taken. And the instructions to the jury, that Woodman, True & Co. were secured in the free and uninterrupted use and enjoyment of sufficient water, at all times, to drive their factory, must have had reference to the question really involved, which was whether the taking of the water by the plaintiff from the factory flume, through the spouts, was inconsistent with the rights of Woodman, True & Co. under the reservation in the deed. These instructions, when taken in connection with those which follow, and applied to the issues presented, are not perceived to be erroneous.

The factory and all the appurtenances belonging to it were retained by the company when it conveyed the mills on the north side of the road, with the reservation touching the use of the water for the factory. The property so retained having come to Woodman, True & Co., they stand in the place of the company at least. The factory flume being necessary to the operation of the factory and the machinery attached for the passage of the water, and no right secured by the deed to the plaintiff to take water therefrom for the use of his own mills, any withdrawal of the water through the spouts, detrimental in any practical degree to the operations of the factory, must necessarily be unauthorized by the deed. If the plaintiff could with impunity take water in that manner to the interruption of the rights of Woodman, True & Co. to the least practical degree, it is not perceived that any limit exists to a further use which might be extended indefinitely, and to the destruction of the rights reserved for the operations of the factory.

But it is insisted for the plaintiff that at the time when the conveyance was made to the plaintiff, and afterwards to Woodman, True & Co., the corn-cracker and shingle-machine were carried by water taken from the factory flume by means of or through spouts; and hence it must be presumed that it was intended by the company, and the plaintiff, and by Woodman, True & Co., that the right so to take water for the purposes designed was reserved to the plaintiff by acquiescence of other parties interested.

It is to be considered that the property in the mills, and the factory and the lands connected with each respectively, was entirely that of the company, prior to the deed to the plaintiff. The manner in which the water was taken to be applied to one part or the other depended upon no fixed legal rights, but might be taken and used not only as necessity, but as convenience or pleasure dictated. The jury have found that the water was taken from the factory flume through spouts, to propel the shingle-machine and corn-cracker, not from necessity, or even to save any considerable expense. And hence the manner adopted in taking and applying the water to the different parts would not continue as matter of title, after the division, unless under some stipulation in the deed or other instrument under seal. The factory flume would be appurtenant to the factory exclusively, unless it became necessary to take water therefrom, for the use of the plaintiff's machinery, which he had a right to operate, or unless, according to the instructions, it could be taken without being practically detrimental to the rights of Woodman, True & Co. The remarks of Shaw, C. J., in the case of *Stanwood v. Kimball*, 13 Met. 526, in relation to a pipe taken from the defendants' aqueduct, which they had cut off, and which cutting off was the cause of the action, are in point, it being in that case contended for the plaintiff that it must be presumed that he designed to reserve that right, and the defendants acquiesced in it. "But it is difficult to maintain this position. There can be no right by reservation, whatever may have been the interest or expectation of the plaintiff, for there is none made in the deed, and it is not competent to prove it by parol evidence; nor by grant, for none is shown or pretended; nor by prescription, for it was used a very short time."

Several questions are presented in the exceptions on account of the rulings of the judge in admitting and rejecting the evidence offered.

The inquiry made of Stephen Emery by the plaintiff, for the purpose of showing no consideration for the deed of the plaintiff to Woodman, True & Co., was clearly inadmissible. The deed purported to be for consideration, and it could not be contradicted by the plaintiff, who was the grantor, and the deed was effectual without consideration between the parties thereto.

Alden Palmer, a witness for the defendants, was allowed to answer the following question, against the objection of the plaintiff: "What would be the effect of opening and shutting the gates of the plaintiff's shingle-machine and corn-cracker

upon the water in the factory flume, and upon the machinery in the factory?" The answer was that the effect would be to produce a motion in the water of the flume, so that it would flow up towards the gate of the factory or recede from it, and give extra motion or retard the wheels of the factory for a short time. The right to put the question and receive the answer was upon the ground that the witness was an expert, or one experienced. It was in evidence that the witness was a millwright, and professed to be a civil engineer; had been employed in the construction of mills and factories for forty years. It cannot be doubted from this evidence he might well be treated by the court as an expert, and entitled to give his opinion touching a matter so connected with his experience.

Henry R. Parsons was asked a question in reference to the place where it would be proper to take the water for the shingle-machine and corn-cracker wheels. Objection was made on the ground that he was not an expert. It appeared that he had carried on the fulling-mill and two carding-machines for twenty years in the same place; that he had used spouts for the purpose of propelling machinery; that he has owned mills and been acquainted with them for thirty years. He must have been experienced in business having relation to the question proposed, and the question was unobjectionable.

The evidence before the jury was such that their verdict and special findings do not appear to the court to have been the result in any degree of those influences or misapprehensions of the facts which authorize a court to disturb a verdict.

Motion and exceptions overruled.

Judgment on the verdict.

RICE, CUTTING, and APPLETON, JJ., concurred.

EXPERTS, WHO ARE, AND IN WHAT CASES EXPERT TESTIMONY IS ADMISSIBLE.—The general rule of law is that witnesses can testify to facts only, and not to opinions or conclusions based upon the facts. It is well settled, however, that with respect to certain classes of questions involving peculiar skill, science, or knowledge, witnesses possessing such skill, science, or knowledge, denominated "experts," may testify, not only to the facts, but to their opinions respecting the facts, so far as necessary to enlighten the jury, and to enable them to come to a right verdict. It is the purpose of this note to ascertain the cases in which expert testimony is admissible, and to determine who are qualified to give such testimony.

GENERAL PRINCIPLES AS TO COMPETENCY OF EXPERT TESTIMONY.—1. *Question must be One of Art, Science, or Skill.* The competency of expert testimony in a particular case depends upon the question as to whether or not any peculiar knowledge, science, skill, or art, not possessed by ordinary per-

sons, is necessary to the determination of the matter at issue; and experts are permitted to testify only in the cases where such knowledge, science, skill, or art is required: *Lawson on Expert Evidence*, 1 et seq.; 1 *Greenl. Ev.*, sec. 440; 1 *Wharton on Ev.*, sec. 434, 436; *Rigsby v. Clear Lake Water Co.*, 40 Cal. 386; *Pelamourges v. Clark*, 9 Iowa, 1; *Hamilton v. Des Moines etc. R. R. Co.*, 36 Id. 81; *Muldowney v. Illinois R. R. Co.*, Id. 462; *Davis v. State*, 38 Md. 38; *Jones v. French*, 37 Miss. 461; *Rosenheim v. America Ins. Co.*, 33 Mo. 230; *Concord R. R. v. Greely*, 23 N. H. 237; *Marshall v. Columbia Ins. Co.*, 27 Id. 157; *People v. Bodine*, 1 Denio, 281; *Sikes v. Paine*, 51 Am. Dec. 389; *Jefferson Ins. Co. v. Cothel*, 22 Id. 567, and authorities cited elsewhere in this note. The rule is thus stated in *Davis v. State*, *supra*: "Whenever the matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, or in other words, when it so far partakes of the nature of a science or trade as to require a previous habit of experience or study in order to the attainment of a knowledge of it, the opinion of experts is admissible. On the other hand, if the matter of inquiry is not such as to require any peculiar habits or study in order to qualify a person to understand it, then such evidence is not admissible: See *Carter v. Boehm*, 1 *Smith's Lead. Cas.* 631."

2. *Not Competent where Question is One of Common Knowledge.* It follows, from what is said in the preceding paragraph, that expert testimony is not admissible as to matters within the experience or knowledge of persons of ordinary information, as to which the jury are competent to draw their own inferences from the facts given in evidence before them, without extraneous aid other than the instructions of the court upon questions of law: 1 *Wharton on Ev.*, sec. 436, and cases there cited; *Phillips v. Starr*, 26 Iowa, 249; *Naughton v. Stagg*, 4 Mo. App. 271; *Newmark v. Liverpool etc. Ins. Co.*, 30 Mo. 130, and cases hereinafter referred to. Under this rule expert testimony is inadmissible respecting the quantity and value of goods which an insured building could contain, that being a matter upon which the jury are competent to pass, if they have the facts before them: Id. 160. So the question as to the sufficiency of a fence to turn cattle is not a proper subject for expert testimony: *Enright v. San Francisco etc. R. R. Co.*, 33 Cal. 230; *Sowers v. Dukes*, 8 Minn. 23. So the question whether a sidewalk is in good repair is one upon which any person of common observation is competent to decide: *Kelleher v. Keokuk*, 60 Iowa, 473; *Benedict v. Fond du Lac*, 44 Wis. 496. So the following questions have been held not to involve any peculiar science or skill, and therefore not to be proper subjects for expert testimony: Whether a two-horse team can be turned in a certain space: *Funston v. Chicago etc. R. Co.*, 61 Iowa, 452; whether a given quantity of wool could be completely burned in a building of a certain size: *Welch v. Franklin Ins. Co.*, 23 W. Va. 238; what are suitable "necessaries" to be furnished to a wife at the expense of her husband: *Compton v. Bates*, 10 Ill. App. 78; *Compton v. Cooper*, Id. 86; whether part of a newspaper found near a dead body had the appearance of being wadding from a gun: *Manke v. People*, 17 Hun, 410; 8 C. 78 N. Y. 611; whether the deceased, in a murder case, could have seen and recognized the person who shot him from the mutual position of the parties: *Jones v. State*, 71 Ind. 66; whether hair found upon the wheelbarrow belonging to defendant in a murder case was the same in appearance with hair taken from the head of the deceased: *Knoll v. State*, 55 Wis. 249; 8 C. 42 Am. Rep. 704. In the case last cited, the witness whose opinion was offered was an expert in human hair, but his opinion was founded merely upon ordinary observation. No doubt if he had undertaken to testify from scientific

experiments or examinations as to the identity of the two specimens of hair shown him his testimony would have been admitted. The opinion of an expert as to the position of the parties to a homicide from an examination of blood spots at the place of the killing is also incompetent: *Dillard v. State*, 58 Miss. 368. So the opinion of a cashier as to the consideration of a certain note based on a coincidence of figures made by a former cashier in the books of the bank: *Lime Rock Bank v. Hewett*, 50 Me. 267. So the opinion of a book-keeper as to the solvency of a firm from an examination of its books: *Perseu etc. Works v. Willett*, 1 Robt. 131. So an opinion of an alleged expert as to a cotton factor's outlays for freight, insurance, etc.: *Patten v. United States*, 15 Ct. of Cl. 238. So an opinion of an innkeeper that it is negligence for a guest at an inn to keep money in his trunk: *Taylor v. Monnot*, 14 Duer, 116. So the opinion of a person acquainted with the mode of accounting in the United States treasury department as to the effect of particular charges in a certain account in that department: *United States v. Willard*, 1 Paine, 539. Similarly, the opinion of a justice of the peace as to the length of time required to hear a certain criminal proceeding in a justice's court is inadmissible: *Evans v. Storey Co.*, 35 Iowa, 128. So an opinion of an expert as to what is the proximate cause of an injury is not ordinarily admissible: *Milwaukee etc. Co. v. Kellogg*, 94 U. S. 469. So an opinion that it is more profitable to discount paper on private account, with borrowed money, than to act as bank agent: *Storey v. Union Bank*, 34 Ala. 687. Many other decisions to the same effect will be cited under subsequent heads in this note.

In many of the cases above noticed, it will be observed that the matter sought to be proved by expert testimony was pure matter of fact, as in *Perseu etc. Works v. Willett*, 1 Robt. 131, where the solvency of a firm was attempted to be so proved. It is obvious that in such a case the question is exclusively determinable by the jury. The resort to expert testimony in cases of that kind is generally due to the fact that direct proof is difficult to be obtained. But certainly it was never intended, in establishing the rule allowing expert testimony, to permit it to be made use of to eke out a case of mere failure of proof.

3. *Not Competent Ordinarily to Determine the Very Question at Issue.* Expert testimony being an exception to the general rule of law excluding opinions from evidence, and trenching, as it does, upon the province of the jury, is not to be extended beyond the necessities of the case. The determination of the matters directly in issue is not thereby to be taken from the jury. Hence the ordinary rule is that the opinions of experts upon the merits, or upon the very matter to be tried, are inadmissible: *Jameson v. Drinkald*, 12 Moo. 148; *Hall v. Goodson*, 32 Ala. 277; *Tingley v. Cowgill*, 48 Mo. 291; *Muldrough's Hill etc. Co. v. Maupin*, 79 Ky. 101; *Teall v. Barton*, 40 Barb. 137. Thus, where the question is as to whether the whipping of a slave is reasonable or cruel, the opinion of an expert upon that point is inadmissible: *Hall v. Goodson*, 32 Ala. 277. So the opinion of an expert as to the amount of damages which the jury should award for an injury concerning which he testifies is incompetent: *Muldrough's Hill etc. Co. v. Maupin*, 79 Ky. 101. So the question as to whether or not the use of a steam dredger without a spark-catcher is dangerous, that being the question to be tried in the case, is not a subject for expert testimony: *Teall v. Barton*, 40 Barb. 137. And generally, where the issue is as to negligence, expert testimony upon that point is inadmissible, as will be seen from cases hereinafter cited. But it must be admitted that this is not an inflexible rule, there being many cases to the contrary. Indeed, the opinions of experts are often admitted upon the very question at

issue: *James v. Johnson*, 12 Ill. App. 286; *Henry v. Hall*, 13 Id. 243. A common instance of this is the admission of medical testimony as to the sanity or insanity of the accused in a criminal case, when that is the very issue to be tried by the jury, provided there is no dispute as to the facts from which the conclusion respecting the prisoner's mental condition is to be deduced, or as to the commission of the offense, if the accused is found to have been capable of committing any offense.

4. *Allowance of, not to be Extended Further than Absolutely Necessary.* It has already been remarked that as expert testimony constitutes an exception to the general rules of evidence, an exception founded upon necessity, the admission of it should be limited within the strict bounds of the necessity. And it is the general disposition of the courts so to restrict it. Indeed, this kind of testimony has always been regarded by conservative jurists with very great disfavor: *Tracy Peerage Case*, 10 Cl. & Fin. 191; *Ferguson v. Hubbell*, 97 N. Y. 507; S. C., 49 Am. Rep. 544; *Grigsby v. Clear Lake Water Co.*, 40 Cal. 296. In *Ferguson v. Hubbell*, *supra*, Earl, J., who delivered the opinion, used the following language: "The rules admitting the opinions of experts should not be unnecessarily extended. Experience has shown that it is much safer to confine the testimony of witnesses to facts in all cases where that is practicable, and leave the jury to exercise their judgment and experience upon the facts proved. Where witnesses testify to facts, they may be specifically contradicted, and if they testify falsely, they are liable to punishment for perjury. But they may give false opinions without the fear of punishment. It is generally safer to take the judgments of unskilled jurors than the opinions of hired and generally biased experts. A long time ago, in *Tracy Peerage Case*, 10 Cl. & Fin. 154, 191, Lord Campbell said that skilled witnesses came with such a bias on their minds to support the cause in which they are embarked that hardly any weight should be given to their evidence. Without indorsing this strong language, which is, however, countenanced by the utterances of other judges, and of some text-writers, and believing that opinion evidence is in many cases absolutely essential in the administration of justice, yet we think it should not be much encouraged, and should be received only in cases of necessity. Better results will generally be reached by taking the impartial, unbiased judgments of twelve jurors of common sense and common experience than can be obtained by taking the opinions of experts, if not generally hired, at least friendly, whose opinions cannot fail generally to be warped by a desire to promote the cause in which they are enlisted."

5. *Expert may Testify to Facts of Scientific Nature.* The ordinary function of experts is, by their superior knowledge, to assist the jury in forming a correct conclusion from the facts in testimony before them. Hence, as a general rule, such witnesses merely give their opinions upon undisputed facts, or upon facts hypothetically stated to them. They may, however, testify to general facts resulting from scientific knowledge or professional skill, where such facts are material. Thus a statement by such a witness, in a proper case, that gas factories are known to have rendered neighborhoods exempt from cholera, yellow fever, etc., is competent: *Emerson v. Lowell Gaslight Co.*, 6 Allen, 146.

GENERAL RULES AS TO WHO ARE EXPERTS.—The word "expert" is defined by Bouvier, according to its Latin derivation, as meaning one "instructed by experience." Other authorities give the term a definition more or less extensive. In *Folkes v. Chadd*, 3 Doug. 157, experts are spoken of as "men of science." In *Strickland on Ev.* 406, they are spoken of as "persons professionally acquainted with the science of practice." Greenleaf's definition is "persons of skill:" 1

Greenl. Ev., sec. 440. Best, in his Principles of Evidence, sec. 346, gives the definition, "conversant with the subject-matter"—a definition, by the way, which would apply equally well to all other witnesses who know what they are testifying about. In *Rochester v. Chester*, 3 N. H. 349, experts are spoken of as "persons of skill;" in *Peterborough v. Jaffrey*, 6 Id. 462, as "experienced persons;" and in *Beard v. Kirk*, 11 Id. 397, as persons "possessed of some peculiar science or skill." The court in *Bryan v. Branford*, 50 Conn. 246, hold that the term includes all persons professionally acquainted "with the science or practice respecting which they testify," thus adopting Strickland's definition. Mr. Justice Doe, in *Jones v. Tucker*, 41 N. H. 548, says: "An expert must have made the subject upon which he gives his opinion a matter of particular study, practice, or observation, and he must have particular and special knowledge on the subject." Dr. Wharton, in his valuable work on evidence, says that "an expert has been defined to be a witness who testifies as to conclusions from facts, while an ordinary witness testifies only as to facts." This definition, however, he declares to be "not sufficiently exact," and it certainly is not. The learned author then says that the true distinction between an expert and a non-expert witness is, "that the non-expert testifies as to conclusions which may be verified by the adjudicating tribunal; the expert to conclusions which cannot be so verified. The non-expert gives the results of a process of reasoning familiar to every-day life; the expert gives the result of a process which can be mastered only by special scientists." 1 Wharton on Ev., sec. 434. This relates, however, merely to the functions of the two classes of witnesses, and throws no light upon the question as to what are the qualifications of an expert witness. We conclude from all the authorities that as expert testimony is competent wherever any question of art, science, or peculiar skill is involved in the issue, an expert is one who is familiar with such art or science, or possesses such skill. The extent of the familiarity or knowledge required of the witness respecting the subject-matter of his testimony cannot be very satisfactorily determined; and no definite rule can be laid down concerning it: *Ardesco Oil Co. v. Gibson*, 63 Pa. St. 146. Mere opportunity for observation is not sufficient to qualify one as an expert upon a question of skill or science. It must be shown that he is skilled or scientific, or at least that he has superior actual skill or knowledge in relation to the question to that possessed by ordinary witnesses or observers: *Page v. Parker*, 40 N. H. 47; *Hinds v. Harbo*, 58 Ind. 121. Yet where the matter is one of real science, it has been frequently decided, as we shall presently see, that knowledge derived exclusively from books and study, without any actual personal experience or practice, may be sufficient to qualify one as an expert. Want of familiarity with the subject, it is held in *Gonzales College v. McHugh*, 21 Tex. 256, goes to the credibility, not to the competency, of the witness; and the rule was applied in that case to witnesses who undertook to testify respecting the value of certain stone-work, although they were not stone-masons. Whether this application of the principle was correct or not, we are inclined to believe from the authorities that the principle itself is sound when restricted to those witnesses who have devoted some special study or practice to the science, art, or trade involved. But it cannot be admitted, as a general rule, that any person may testify upon a subject as to which expert testimony is admissible, leaving his want of adequate special knowledge to weigh, not against his competency, but against his credibility with the jury. It is not necessary that a witness who undertakes to testify as an expert in any business should be then engaged in that business. He is still competent as an expert after abandoning the business: *Bearse v. Copley*, 10 N. Y. 23.

The question of the competency of an expert is to be determined by the court: 1 Wharton on Ev., sec. 437; *Gulf City Ins. Co. v. Stevens*, 51 Ala. 121; *Bills v. Ottumwa*, 35 Iowa, 107; *Davis v. State*, 38 Md. 15; *Dole v. Johnson*, 50 N. H. 452; *Commonwealth v. Sturtevant*, 117 Mass. 122; S. C., 19 Am. Rep. 401; *Delaware etc. Co. v. Starra*, 69 Pa. St. 36. The court has a sound discretion as to admitting or rejecting experts, and its decision will not ordinarily be reviewed, unless there is a clear and strong case against it: *Commonwealth v. Sturtevant*, *supra*; *Sorg v. First German etc. Cong.*, 63 Pa. St. 156; *Delaware etc. Co. v. Starra*, 69 Id. 36. In New Hampshire, especially, it is held that the decision of the trial judge on this point is final: *Jones v. Tucker*, 41 N. H. 546; at least where there is any evidence whatever to support it: *Dole v. Johnson*, 50 Id. 452. Any evidence showing the qualifications of an alleged expert, which is otherwise competent, is admissible for what it is worth: *State v. Maynes*, 61 Iowa, 119; especially where the expert is not present, but his testimony upon a former trial is read to the jury: Id. Inquiries as to the qualifications of an expert cannot be excluded by the trial court, though those qualifications were established at a former trial between other parties: *Philadelphia Fire Association v. Merchants' Bank*, 52 Vt. 83. The jury have a right to know what the qualifications of a witness are, so as to be able to give the proper weight to his testimony. If it appears that the experience of the witness has not been great, other witnesses of longer experience may be examined as to the time necessary to render one an expert in that business: *Mason v. Phelps*, 48 Mich. 128.

Having thus stated the general doctrines as to what cases are proper subjects for expert testimony, and as to who are experts, we proceed now to a consideration of particular subjects upon which such testimony has been deemed admissible.

PROOF OF LAWS BY EXPERT TESTIMONY.—It is shown in the note to *State v. Twitty*, 11 Am. Dec. 785, that the unwritten law of a foreign state or country may be proved by the testimony of persons skilled therein: See also, to the same effect, *Kenny v. Clarkson*, 3 Am. Dec. 336; *Dougherty v. Snyder*, 16 Id. 520; *Newson v. Adams*, 22 Id. 126; *Phillips v. Gregg*, 36 Id. 158. Thus, the practice and usage of the courts of another state, as to the service of a summons to support a judgment, there being no express statute on the subject, may be proved by expert testimony: *Mowry v. Chase*, 100 Mass. 79. So it may be shown by similar testimony that under the law of another state a certain note is negotiable: *Tyler v. Trubee*, 8 B. Mon. 106. So the sufficiency of a deed under the law of another state, there being no statute on the subject, may be similarly proved: *Wilson v. Carson*, 12 Md. 54. And the same rule applies, it seems, as to the proof of foreign statutes: Lawson on Expert Ev. 52; 1 Wharton on Ev., secs. 302, 305, and cases cited. But in *Kenny v. Clarkson*, 3 Am. Dec. 336, it is held that foreign statutes cannot be proved by parol. In *Phillips v. Gregg*, 36 Id. 158, it is said that foreign statutes are ordinarily to be proved by duly authenticated copies, but that the rule is not universal: See also the note to *State v. Twitty*, above referred to.

In England, the rule as to who are experts to prove a foreign law seems to be very strict. Thus, it is held that an English barrister, practicing before the privy council in Canadian appeal cases, is not a competent expert to testify upon a question of Canadian law: *Cartwright v. Cartwright*, 26 W. R. 694. So a "certified special pleader," declaring himself familiar with Italian law, is not a competent witness as to that law in a particular case: *Bonelli's Goods*, L. R. 1 P. D. 60; S. C., 45 L. J. P. 42; 34 L. T. 32; 24 W. R. 254.

In that case it was held, also, as a general rule, that one whose only knowledge of a foreign law was derived from his having studied it in a foreign university was incompetent to testify respecting the operation and effect of such law. The rule formerly in England was less strict; laymen, familiar with foreign laws, being admitted to testify thereto: *Vanderdonckt v. Thelluson*, 8 C. B. 112; *Queen v. Dent*, 1 Car. & K. 97. And still, where the law of a country, like Persia, which has the misfortune—if it be a misfortune—to be without professional lawyers, is to be proved, the testimony of other persons, required by their official station to be familiar with such law, is admissible for that purpose: *Re Doet Ali Khan*, L. R. 6 P. D. 6. So the matrimonial law of Rome may be proved in the English courts by a Roman Catholic bishop who has studied it: *Sussex Peerage Case*, 11 Cl. & Fin. 134.

In the United States, a foreign law may be proved by any person familiar with it, whether a lawyer: *Consolidated etc. Ins. Co. v. Cashow*, 41 Md. 59; *Barrows v. Downs*, 9 R. I. 446; S. C., 11 Am. Rep. 283; or one who has acted under it as a justice of the peace or other officer: *Pickard v. Bailey*, 26 N. H. 152; *Brush v. Wilkins*, 4 Johns. Ch. 506; or a mere layman: *Hall v. Costello*, 48 N. H. 176; S. C., 2 Am. Rep. 207; *Wilcocks v. Phillips*, 1 Wall. jun. 49; *Kenny v. Clarkson*, 3 Am. Dec. 336; *Phillips v. Gregg*, 36 Id. 158. A lawyer residing in another state, and of mature age, is *prima facie* competent as an expert to prove the law of that state, without further evidence of qualification: *Consolidated etc. Ins. Co. v. Cashow*, 41 Md. 59. A lawyer admitted as an expert to prove a foreign statute may, it seems, testify from a printed copy of such statute. Thus a Spanish lawyer who has practiced in Cuba may testify to the law of special partnerships in Cuba, from a printed copy of the Spanish code of commerce: *Barrows v. Downs*, 9 R. I. 446; S. C., 11 Am. Rep. 283.

The domestic law of a country, whether statute or common, cannot be proved in its own courts by expert testimony: *Lee v. Breezly*, 54 Iowa, 600; *Gaylor's Appeal*, 43 Conn. 82; *Pittsburgh etc. R. R. Co. v. Reich*, 101 Ill. 157. Thus expert testimony that a certain petition was in proper legal form is inadmissible: *Massune v. Noble*, 11 Id. 531. So, expert testimony that a certain street is a public highway: *Pittsburgh etc. R. R. Co. v. Reich*, 101 Id. 157.

MEDICAL QUESTIONS, EXPERT TESTIMONY AS TO.—1. *Competency of Physicians and Surgeons as Experts, Generally.*—That practicing physicians, generally, are competent to testify as experts upon questions within the range of their profession is too well settled to require the citation of authority. It is not necessary, in order to render a physician competent to testify as an expert, that he should be a graduate of a medical college, or have a license to practice from any medical board: *New Orleans etc. Co. v. Allbritton*, 38 Miss. 242. Nor need he have been in full practice at the time of the occurrence concerning which he testifies: *Roberts v. Johnson*, 58 N. Y. 613. He may give an opinion upon a question as to which his knowledge is based on reading and study alone: *State v. Wood*, 53 N. H. 434; *State v. Terrell*, 12 Rich. 321; see also *State v. White*, 76 Mo. 96. But he cannot testify as to statements contained in books: *Boyle v. State*, 57 Wis. 472; S. C., 46 Am. Rep. 41. If the witness says he attended a party as a physician, this is sufficient evidence, *prima facie*, of his professional character to entitle him to testify: *Washington v. Oble*, 6 Ala. 212. But in *Polk v. State*, 36 Ark. 117, it was held that where a doctor was not shown by the bill of exceptions to have been a practicing physician, or to have had any peculiar means of knowledge, from study or experience, his opinion as an expert was improperly admitted. It appears, however, in that case, that the opinion was based upon the statements of

others respecting the symptoms, and it was not shown who stated them. The fact that the question submitted to a medical witness relates to a subject to which he has not given special attention does not render his testimony incompetent. Thus, a physician who is not an oculist or a surgeon is nevertheless competent to testify respecting an injury to the eye: *Castner v. Slicker*, 33 N. J. L. 95; S. C., Id. 507. So a physician who is not a practical chemist or experienced in analyzing poisons, but who has a general knowledge of the subject of poisoning, and of tests for poisons, and has analyzed the contents of the stomach of the deceased in the particular case, is competent to give an opinion as to whether or not the death resulted from poison, etc.: *State v. Hinkle*, 6 Iowa, 380. So a physician who has a limited knowledge as to the value of slaves, but who has examined and prescribed for a particular slave, is competent to testify that the cost of her medical attendance will exceed her profits to her owner: *Roberts v. Fleming*, 31 Ala. 683. A physician is not by reason of his profession an expert as to the value of slaves: *Hook v. Stovall*, 26 Ga. 704. But he is an expert as to the soundness of a slave, as affected by disease, and as to the character and duration of such disease, etc.: *Tatum v. Mohr*, 21 Ark. 349; *Jones v. White*, 11 Humph. 268.

2. Upon What Matters Medical Expert Testimony Generally Admissible.—The sphere of medical expert testimony is practically co-extensive with the range of medical skill and science. A medical witness is therefore competent to give an opinion generally upon the symptoms, cause, treatment, duration, and probable consequences of diseases and personal injuries: *Roberts v. Fleming*, 31 Ala. 683; *Parker v. Johnson*, 25 Ga. 576; *Hook v. Stovall*, 26 Id. 704; *Brant v. Lyons*, 60 Iowa, 172; *Perkins v. Railroad*, 44 N. H. 223; *Matteson v. N. Y. etc. R. R. Co.*, 66 Barb. 364; *Jones v. White*, 11 Humph. 268; *Gilman v. Stratford*, 50 Vt. 723. After having examined a wound, or having had it described to him in a hypothetical question, or by the testimony of other witnesses, where there is no conflict of evidence, a physician or surgeon may give his opinion as to the nature of the weapon which produced it: *State v. Morphy*, 33 Iowa, 270; *State v. Knight*, 43 Me. 11; *Davis v. State*, 38 Md. 15; *Wilson v. People*, 4 Park. Cr. 619; *Gardner v. People*, 6 Id. 155, 202; *People v. Rogers*, 13 Abb. Pr., N. S., 370. He may testify, also, as to whether a particular weapon, shown to him and compared with the wound, would have been competent to produce it: *Davis v. State*, 38 Md. 15; *People v. Rogers*, 13 Abb. Pr., N. S., 370; *White v. State*, 13 Tex. App. 169; *Bank v. State*, Id. 182. And after a description or examination of the place in which the body was found, he may give an opinion as to whether or not the wounds produced upon it could have been the result of a fall against a particular object, or the like: *Davis v. State*, *supra*. But where there are a number of gun-shot and knife-wounds upon the body, and the witness has examined only the knife-wounds, his testimony that a certain wound was caused by the first shot fired is incompetent: *Hunt v. State*, 9 Tex. App. 166. A physician or surgeon may also testify as to the cause of death in a particular case, where he has made a personal examination, or the facts are properly brought to his notice by other testimony, or by hypothetical questions; and may give an opinion whether a particular injury was the cause of death: *Ebos v. State*, 34 Ark. 520; *State v. Crenshaw*, 32 La. Ann. 406; *State v. Smith*, 32 Me. 369; S. C., 54 Am. Dec. 578; *State v. Clark*, 15 S. C. 403; *Shelton v. State*, 34 Tex. 662; *Livingston's Case*, 14 Gratt. 592.

In a case of alleged poisoning, he may testify from an examination or from a hypothetical statement whether death resulted from poisoning: *Mitchell v. State*, 58 Ala. 417. So, though the idea of poison being used was first suggested

to him by the information that there was poison in the house: *Id.* So he may testify as to whether death occurred before or after a particular injury, where it requires medical skill to determine the fact: *State v. Clark*, 15 S. C. 403; *Shelton v. State*, 34 Tex. 662. He may give an opinion, also, from a *post-mortem* examination as to whether or not a woman was pregnant at the time of her death: *State v. Smith*, 54 Am. Dec. 578; S. C., 32 Me. 369. So he may testify as to the probable consequences of a personal injury, where they are not contingent, speculative, or merely possible: *People v. Kerrains*, 1 Thomp. & C. 333; *Strohm v. New York etc. R. R. Co.*, 96 N.Y. 305; *Anthony v. Smith*, 4 Bosw. 503; *Johnson v. Central etc. R. R. Co.*, 56 Vt. 707. It has been held that the opinion of a medical witness is competent as to the future ability of an injured person to do heavy work: *Johnson v. Central etc. R. R. Co.*, 56 Id. 707. But in *Kline v. Kansas etc. R. R. Co.*, 50 Iowa, 656, an opinion of a physician that a brakeman whose hand had been injured and one of his fingers permanently stiffened by an accident would never be able to follow any occupation requiring a "quick and ready hand," was declared inadmissible, on the ground that this was a matter of which the jury were as well able to judge as the witness, after the facts were known. And this would seem to be sound doctrine. A physician of ordinary experience may also testify as to whether or not a child, at whose birth he was present, was a "full-time child:" *Young v. Makepeace*, 103 Mass. 50. So he may testify as to whether or not a scientific opinion that a child was prematurely born can be based upon the fact that it had no hair, eyebrows, or toe-nails: *Daeghing v. State*, 56 Wis. 586. It has been held, also, that, in a prosecution for seduction, where the alleged intercourse was said to have taken place in a buggy, under certain circumstances, medical testimony that such intercourse would have been impossible or very painful was admissible: *People v. Clark*, 33 Mich. 112. But, to say the least of it, this is certainly a very novel application of the rule admitting expert testimony on questions of science, art, or skill: See on this point the note to *Weaver v. Buchert*, 44 Am. Dec. 173. In a suit for alleged malpractice against a fellow-member of the profession, a medical witness may, upon a hypothetical statement of facts, it seems, state whether or not the facts as stated indicate such care and attention as the case demanded: *Olmsted v. Gere*, 100 Pa. St. 127. He may state, also, whether or not the treatment of a surgical case was proper, but he cannot give an opinion upon all the evidence as to whether or not the defendant was guilty of malpractice, that being the very question which the jury are to try: *Hoener v. Koch*, 84 Id. 408.

The general rule heretofore laid down, that experts are not permitted to give opinions upon facts of common observation or upon matters which it is within the province of the jury to decide, applies to medical as well as to other experts. Hence, a physician or surgeon, in a murder case, cannot be admitted to give an opinion that certain burns upon the body of the deceased took place after death, for the reason that those parts of the body which were covered with clothing had not been burned, thus showing that it had been at rest during the burning, this being an inference from ordinary facts which the jury are as well able to draw as the witness: *People v. Bodine*, 1 Denio, 281. So the opinion of a surgeon is inadmissible as to the positions of the respective parties to a homicide at the time the mortal blows were given, he having already testified to the location, form, extent, and direction of the wounds upon the body of the deceased: *Kennedy v. People*, 39 N. Y. 245; S. C., 5 Abb. Pr., N. S., 147. But the case of *Gardner v. People*, 6 Park. Cr. 155, 202, seems to be adverse on this point, a medical witness having been

permitted in that case to give an opinion as to the direction from which the fatal injury was received. But, as laid down in *Kennedy v. People, supra*, it would certainly seem that after a full description of the wound upon a dead body a person of ordinary experience is as competent as any physician or surgeon to determine the direction from which the blow came. In accordance with the general rule upon this subject, the opinion of a physician that the inflamed condition of a female's genital organs was produced by rape is incompetent, that being a matter for the jury's determination: *Noonan v. State*, 55 Wis. 258. So, an opinion of a medical expert, that if a person afflicted with *melancholia* should commit suicide, such suicide would be attributable to the disease: *Van Zant v. Mutual Benefit Ins. Co.*, 55 N. Y. 169; 8 C., 14 Am. Rep. 215. So, the opinion of such a witness as to whether a woman would be likely to swoon or to be nerved with unusual strength where rape was attempted to be committed upon her: *Cook v. State*, 24 N. J. L. 843. So, an opinion that hemorrhage was caused by the patient's negligence: *Brant v. Lyons*, 60 Iowa, 172. So, an opinion, in a libel case, that a physician refusing to consult with another honorably discharged his duty to his profession: *Ramadge v. Ryan*, 2 Moo. & S. 421; 8 C., 9 Bing. 333. Other cases illustrating the general doctrine that a medical expert cannot be allowed to trench upon the jury's province and give an opinion upon matters which they are competent to decide, or which it is their duty to decide, have already been mentioned elsewhere in this note; as, where the question was as to the ability of a person, injured by coupling cars, thereafter to do certain work: *Kline v. Kansas etc. R. R. Co.*, 50 Iowa, 656. So, where a surgeon gave an opinion that the first of a number of shots caused a certain wound: *Hunt v. State*, 9 Tex. App. 166. So, where a physician's opinion as to the amount of damages was sought to be introduced: *Muldrough's Hill etc. Co. v. Maspin*, 79 Ky. 101. Contrary to some of these cases, apparently, a physician was permitted, in *Sullivan v. Commonwealth*, 93 Pa. St. 284, to give an opinion as to the effect of shots at short range in producing powder marks on clothing. It seems, however, in that case, that the witness did not testify as a physician, but rather as an expert in the use of fire-arms, he having made certain experiments in shooting at cloth for the purposes of the trial. In this view, the testimony was perhaps competent.

While it is not our purpose in this note to enter into a discussion of the mode of examining an expert, it is proper to state, in this connection, that while a medical witness may testify as to diseases and personal injuries from his own examination and treatment of them, and from the statements of the party, *Atchison etc. R. R. Co. v. Frasier*, 27 Kan. 463, he cannot do so without stating the facts upon which his opinion is founded: *Matteson v. New York etc. R. R. Co.*, 62 Barb. 364; *Hitchcock v. Burget*, 38 Mich. 501. Thus, where a physician gives an opinion as to the cause of spinal trouble or other disease in a person whom he has treated, he must state the facts upon which the opinion was based: *Matteson v. New York etc. R. R. Co., supra*. And generally, he cannot give an opinion based upon facts not in evidence: *Burns v. Barenfield*, 84 Ind. 43; nor upon conflicting evidence: *Henry v. Hall*, 73 Ill. App. 343; *Bishop v. Spinney*, 38 Ind. 143. He cannot testify as to the cause of the physical condition of the person examined by him without any knowledge as to how that condition came about: *Hitchcock v. Burget*, 38 Mich. 501. A medical expert, like any other expert, may give his opinion upon a hypothetical statement of facts: *Leming v. State*, 52 Am. Dec. 153; 1 Wharton on Ev., sec. 452. It is laid down in *Clark v. State*, 49 Am. Dec. 481, that medical expert testimony is to be given with care and received with caution.

3. *Medical Experts on Questions of Insanity, Qualifications of, and Competency of their Testimony.*—A medical witness, in order to be competent to give an opinion on a question of insanity, need not have made mental disease a specialty. If he has given some attention to it he is competent, and it is for the jury to say, from the extent of his acquaintance with the subject, what weight is due to his opinions upon it: *Davis v. State*, 35 Ind. 496. Thus where a witness had studied "psychological medicine some," and had had experience in the incipency of mental disease in certain cases, he was held competent: *State v. Reddick*, 7 Kan. 143. And generally, a practicing physician is deemed competent to testify to the mental condition of a person under his professional treatment: *Fairchild v. Bascomb*, 35 Vt. 398. But in some cases, especially where the witness has been called to give an opinion as to the sanity of a person from facts detailed by other witnesses, or embodied in a hypothetical statement, a more stringent rule has been applied. Thus in *Commonwealth v. Rich*, 14 Gray, 335, a physician who had not made mental disease a special study, but who when insanity cases came to him in practice was accustomed to call in a specialist or to recommend removal to an asylum, was held incompetent to testify as to the sanity of a person who was not his patient. So in *Russell v. State*, 53 Miss. 368, it was laid down that to qualify one as an expert in insanity something more than ordinary medical knowledge and skill was required; and that a country physician who had been in general practice for twenty years, but had never made mental disease a special study, and was not experienced in "psychological medicine," was not competent to testify upon the subject.

When it appears that a medical witness is competent to testify as an expert upon a question of insanity, he may give his opinion thereon from personal acquaintance or from an examination of the party: *Freeman v. People*, 47 Am. Dec. 216; *Potts v. House*, 50 Id. 329; *McAllister v. State*, 52 Id. 180; or without any personal knowledge or examination, upon facts proved at the trial in his hearing, if the evidence is not conflicting: *McNaghten's Case*, 10 Cl. & Fin. 260; S. C., 8 Scott N. R. 595; 1 Car. & K. 130; *Sutton v. Reagan*, 33 Am. Dec. 466; *Commonwealth v. Rogers*, 41 Id. 458; *Fairchild v. Bascomb*, 35 Vt. 398; or from a hypothetical statement of the facts: *Lake v. People*, 1 Park. Cr. 495; *State v. Coleman*, 20 S. C. 441. From an examination at a particular time, he may testify as to the party's mental condition at a prior period, it seems: *Freeman v. People*, 41 Am. Dec. 216. The question for the expert, in such cases, is not ordinarily as to the capacity of the party to do the particular controverted act, that being a matter for the jury, but as to his general mental capacity. Thus the physician should not be asked, in case of a dispute as to a testator's sanity, whether or not such testator possessed capacity to make a will, but as to what his intelligence was: *Fairchild v. Bascomb*, 35 Vt. 398; *Walker v. Walker*, 34 Ala. 469. But see *Melendy v. Spaulding*, 53 Vt. 517. In a criminal case, also, it is for the jury, no doubt, to say whether or not the prisoner had sufficient capacity to commit the offense; but where a medical witness has testified that the accused was insane, he may be asked on cross-examination whether, in his opinion, the accused could distinguish right from wrong, or knew that it was wrong to commit murder, rape, or other crime: *Clark v. State*, 40 Am. Dec. 481. Where it is shown that the prisoner, in a case of homicide, has an hereditary predisposition to insanity, a medical expert may be asked whether or not mental anxiety, loss of property, or disgrace would be likely to develop the disease, where the evidence is such as to warrant such a question: *Defarnette v. Commonwealth*, 75 W. Va. 869.

4. *Opinions of Persons Who are not Physicians upon Medical Questions.*—The general rule is, that non-medical witnesses are not competent to testify as to the existence, nature, extent, or causes of disease: *McLean v. State*, 16 Ala. 672; *Thompson v. Bertrand*, 23 Ark. 730; *Lush v. McDaniel*, 57 Am. Dec. 566; *Luning v. State*, 52 Id. 153. Thus the opinion of a non-medical witness that a female slave had the venereal disease was held incompetent in *Lush v. McDaniel*, 57 Id. 566. So, the opinion of an overseer as to the unsoundness of a slave: *Thompson v. Bertrand*, 23 Ark. 730. So, the opinions of the inhabitants of a particular locality as to the effect of the overflowing of the land there, upon the health of the community: *Luning v. State*, 52 Id. 153. Similarly, the opinion of one who had known a person several years before a certain injury, and had been with such person several weeks afterwards, as to the effect of the injury upon the health: *Monongahela Water Co. v. Stewartson*, 96 Pa. St. 436. A witness who had never studied medicine or surgery, but who had seen six or eight gun-shot wounds and knife-wounds, and a few swellings lanced, was held incompetent to give an opinion whether a particular wound was a gun-shot wound or a wound made by a cutting instrument, in *Caleb v. State*, 39 Miss. 721. But it has been held that a non-medical witness was competent to testify that a certain wound caused death, in *State v. Smith*, 22 La. Ann. 468. The soundness of this decision, however, is very doubtful. So it has been decided that a non-medical witness may testify as to whether or not a child was fully developed at birth: *Hubbard v. State*, 72 Ala. 164. Where such testimony is admissible, it goes without saying that the witness will be allowed to speak only from personal knowledge, and that he cannot, like a medical expert, give an opinion upon the testimony of others, or upon a hypothetical statement. A toxicologist or chemist having experience in detecting poisons and in making *post-mortem* examinations therefor is competent to give testimony as to the effect of poisons upon the system: *State v. Cook*, 17 Kan. 392; and as to the possibility of a physician's being able to determine the cause of death, in a poisoning case, from mere inspection of the organs: *Hartung v. People*, 4 Park. Cr. 319.

With respect to insanity, it is well settled in most of the states that non-medical witnesses are competent to give their opinions, where such opinions are based upon personal knowledge or observation, and the facts upon which they are so based are stated to the jury: *Sutton v. Reagan*, 33 Am. Dec. 466; *Clark v. State*, 40 Id. 481; *Morse v. Crawford*, 44 Id. 349; *Maxwell v. Harrison*, 52 Id. 385; *Potts v. House*, 50 Id. 329, and cases cited in the notes thereto; Lawson on Expert Ev. 476, collecting a multitude of cases. Except as applied to the subscribing witnesses to a will, however, this doctrine is not admitted, as Mr. Lawson shows, in Massachusetts, Maine, New Hampshire, and Texas: Id. A Catholic priest who is required by his office to ascertain the mental condition of the sick and dying before administering the rites of the church, and who is qualified for that duty by his preliminary training, it is held in *Estate of Toomes*, 54 Cal. 509, S. C., 35 Am. Rep. 83, is competent as an expert to give an opinion upon a question of insanity.

DISEASES OF ANIMALS, EXPERT TESTIMONY RELATING TO.—Aside from those whose business it is to deal with diseases of animals, it is held that an ordinary physician who has never treated such diseases, and has no special knowledge relating thereto outside of his general education as a member of the medical profession is competent to give an opinion thereon as an expert: *Horton v. Green*, 64 N. C. 64; *State v. Sheets*, 89 Id. 543; *Pierson v. Hoag*, 47 Barb. 243. Such a witness, professing his ability to do so, may testify as to whether or not a disease in a mule is of long standing: *Horton v. Green*,

supra; or as to the effect of poison on a horse, though he has never had such a case in his practice: *State v. Sheets, supra*. So he may declare what is the best medical opinion, from his reading, as to the cause of the death of a horse: *Pierson v. Hoag, supra*. A witness who is neither a farrier nor a physician, but who has had experience in the treatment of diseases of animals, may also testify as an expert on that subject: *Slater v. Wilcox*, 57 Barb. 604; *House v. Fort*, 4 Blackf. 293. The scarcity of persons who make that their distinctive calling renders it necessary that there should be a liberal rule on this subject: *Id.* Thus a witness, not a farrier, who professed to understand when he tried a horse whether his eyes were good or not, though there might be diseases of horses of which he knew nothing, was held competent to testify as to whether or not there was any defect in a horse's eyes: *House v. Fort, supra*. But it was held in *Dole v. Johnson*, 48 N. H. 452, an instructive case on the qualifications of experts, that the editor of a stock journal was not competent to testify whether or not "foot-rot" in sheep was ever generated spontaneously, unless he was a veterinary doctor, qualified by some reading and study, with some practical experience in diseases of sheep, or unless he was really a man of science.

HANDWRITING, EXPERT TESTIMONY RELATING TO.—1. *Points respecting Which Handwriting Experts may Testify.*—Among the questions relating to handwriting upon which expert testimony has been held admissible are the following: Whether the whole of an instrument, body and signature, was written at the same time, by the same hand, and with the same ink: *Quinsigamond Bank v. Hobbs*, 11 Gray, 250; *Fulton v. Hood*, 34 Pa. St. 365; *Reese v. Reese*, 90 Id. 89; *Dubois v. Baker*, 40 Barb. 557; whether there has been any alteration in the instrument: *Nelson v. Johnson*, 18 Ind. 329; and if so, whether the alteration is in the same handwriting as the instrument: *Hawkins v. Grimes*, 13 B. Mon. 258; whether the instrument has been written over an erasure: *Regina v. Williams*, 8 Car. & P. 434; and other questions of the same kind. But upon the point as to whether or not part of an instrument was written over a fold after the document had been folded and soiled, expert testimony was held inadmissible in *Sackett v. Spencer*, 29 Barb. 180, because that was a matter within the common observation of ordinary jurymen.

The principal question, however, has been whether or not expert testimony is competent to prove or disprove the genuineness of a writing by comparison with other writings. Of course where the witness is acquainted with the writing of the person who wrote the instrument, and identifies it by that acquaintance, it cannot be said to be, in strictness, a case of expert testimony at all. As to this class of cases there is no controversy. But when a witness, without having acquired a knowledge of the handwriting of a party by seeing him write, or other recognized mode, undertakes, through his skill in such matters, to determine, by mere comparison with a genuine instrument, whether or not a disputed writing is genuine also, he may be regarded as an expert. This sort of evidence was inadmissible at common law, except where both the writings compared were already in the case, or were ancient writings: *Lawson on Expert Ev.* 329. But the prevailing rule now is, both in England and in this country, either by statute or by adjudication, that such evidence is competent. See the note to *Homer v. Wallis*, 6 Am. Dec. 171, where this subject of "comparison of hands" is perhaps sufficiently discussed: *Moody v. Rowell*, 28 Id. 317; *Hess v. State*, 32 Id. 767; *May v. State*, 45 Id. 548; *Northern Bank v. Buford*, 1 Duv. 335; *Withee v. Rowe*, 45 Me. 571; *Woodman v. Dana*, 52 Id. 9; *Moye v. Henderson*, 30 Miss. 110; *State v. Shinn-born*, 46 N. H. 497; *West v. State*, 22 N. J. L. 212; *Miles v. Loomis*, 75 N. Y.

- 288; *Hicks v. Person*, 19 Ohio, 426; *Callins v. State*, 14 Ohio St. 222; *contra: People v. Spooner*, 43 Am. Dec. 672; *Tome v. Parkersburg R. R. Co.*, 39 Md. 36; S. C., 17 Am. Rep. 540; *Herrick v. Swomley*, 56 Md. 439; *Tyler v. Todd*, 36 Conn. 218; *Davis v. Fredericks*, 3 Mont. 262; *Clark v. Rhodes*, 2 Heisk. 206; *Wright v. Hasey*, 3 Baxt. 42; *Burress's Case*, 27 Gratt. 946; *Clay v. Alderson*, 10 W. Va. 50; *Moore v. United States*, 91 U. S. 271. But even where an expert is permitted to testify from a comparison of hands to the genuineness of a signature, he cannot testify from a comparison with photographic copies of other writings not present, there being no extrinsic proof of the accuracy of the copies: *Hynes v. McDermott*, 82 N.Y. 41; S. C., 37 Am. Rep. 548; see also *Taylor Will Case*, 10 Abb. Pr., N. S., 301. Where the writing whose genuineness is disputed has been lost, an expert who has examined it before loss may compare his recollection of it with a genuine instrument: *Abbott v. Coleman*, 22 Kan. 250.

2. *Who Deemed Experts as to Genuineness of Writings and the Like.*—As a general rule, any person who by reason of his employment, or otherwise, has acquired skill in the comparison of signatures, and in the detection of forgeries and counterfeits, is competent to testify respecting the genuineness of an instrument or signature from a proper comparison, or as to alterations, etc.: *Ort v. Fowler*, 31 Kan. 478; *Murphy v. Hagerman*, Wright, 293; *Jones v. Finch*, 37 Miss. 461. Thus a writing-master professing skill in detecting forgery is competent to give an opinion from comparison as to the genuineness of the signature: *Moody v. Rowell*, 28 Am. Dec. 317. So experienced bank tellers, cashiers, etc., may testify as experts, whether a bank bill or other writing is counterfeit or forged, from comparison with genuine instruments, or from internal marks: *Speiden v. State*, 3 Tex. App. 156; *State v. Cheek*, 13 Ired. L. 114; *People v. Hewitt*, 2 Park. Cr. 20. So such a witness may, of course, testify as to the genuineness of the bills of a bank, whose paper he has been accustomed to handle: *Johnson v. State*, 35 Ala. 370. So a bank cashier is competent to say whether a particular writing shown him has been altered: *Pate v. People*, 3 Gilm. 644; or as to whether writing on an erasure was written before or after the body of the note: *Dubois v. Baker*, 40 Barb. 557. A post-office clerk accustomed to inspect frank's to detect forgeries is also competent to determine whether a writing is in a simulated or natural hand: *Goodtitle v. Braham*, 4 T. R. 497; *King v. Cator*, 4 Esp. 187. So a clerk of a court who has been frequently called on to examine signatures with respect to their genuineness is a competent expert in handwriting: *Yates v. Yates*, 76 N. C. 142; *contra: People v. Spooner*, 43 Am. Dec. 672. A photographer who has been accustomed to examine handwriting with a view to detecting forgeries is also competent to testify to the genuineness of a signature: *Marcy v. Barnes*, 16 Gray, 161; or as to whether certain words were written before or after the paper was folded: *Bacon v. Williams*, 13 Id. 525. So an engraver may be a competent expert to determine whether an instrument has been written over pencil marks: *Regina v. Williams*, 8 Car. & P. 434; or to distinguish between a genuine impression of a seal and a false one: *Folkes v. Chadd*, 3 Doug. 157. An experienced police officer, familiar with bogus bonds, may testify as to whether a particular bond is of that character: *State v. Norton*, 76 Mo. 180. The fact that the experience of a witness has been confined to a comparison of promissory notes does not render him any the less competent with respect to other writings: *Commonwealth v. Williams*, 105 Mass. 62. Where a witness testifies that he has skill and experience in judging of handwritings, the fact that his business has not required him to distinguish between genuine and simulated handwritings

was held not sufficient, *per se*, to exclude his opinion, based upon a comparison of writings, in *Sweetser v. Lowell*, 33 Me. 446. But in *Goldstein v. Black*, 50 Cal. 462, it was decided that a court clerk of several years' experience, who had a good deal of experience in copying handwriting and tracing signatures and figures, but had made no study of the subject, was not a competent expert as to the genuineness of a signature; see also *People v. Spooner*, 43 Am. Dec. 672. In *Elingwood v. Bragg*, 52 N. H. 490, an attorney of forty years' practice, who had had his attention called to the comparison of handwritings on several occasions, but had made no study of it, was declared incompetent to testify whether certain entries in a book were made at the same or different times.

EXPERT TESTIMONY IN QUESTIONS OF ART.—An artist is a competent expert to give an opinion as to the genuineness of a picture: *Folkes v. Chadd*, 3 Doug. 157. And an ambrotypist and daguerreotypist is competent to give an opinion as to whether or not photographs are well executed, the court taking judicial notice that his business is closely connected with photographic painting, of which he had some experience: *Barnes v. Ingalls*, 39 Ala. 193. But opinions of artistic experts as to whether or not certain photographs are obscene are incompetent, that not being a matter for their determination: *People v. Muller*, 96 N. Y. 408; S. C., 48 Am. Rep. 635.

SURVEYORS AND CIVIL ENGINEERS AS EXPERTS.—A practical surveyor, familiar with the marks of United States surveyors, is competent to give an opinion as to whether a certain line was marked by them: *Brantly v. Swift*, 24 Ala. 390. So a surveyor may testify that certain marks on a tree are corner or line marks: *Clegg v. Fields*, 7 Jones L. 37; see also *Barron v. Cobleigh*, 35 Am. Dec. 505. So he may give an opinion as to the correctness of his own plats and surveys: *Messer v. Reginnitter*, 32 Iowa, 312. Nor need he be a county or government surveyor to testify to his own surveys or plats: *Mincke v. Skinner*, 44 Mo. 92. The opinion of a surveyor as to the proper location of a grant or conveyance is inadmissible, that being a question upon which the jury are competent to pass: *Farar's Heirs v. Warfield*, 8 Mart., N. S., 695; *Blumenthal v. Roll*, 24 Mo. 113; *Schutz v. Lindell*, 30 Id. 319. Nor is his opinion that a certain corner is the corner of a particular grant competent: *Clegg v. Fields*, 7 Jones L. 37. And generally, his opinion as to the construction of a survey which has been returned is incompetent: *Ormsby v. Ihmsen*, 34 Pa. St. 462. A surveyor often employed in laying out roads, with respect to grade, but not employed in construction, is not competent to give an opinion as an expert upon the safety and convenience of a particular road: *Lincoln v. Barre*, 5 Cush. 590.

The opinion of a civil engineer, who has taken the levels of a certain fountain and certain drains, and has examined the character of the soil, as to whether or not the drains affect the water in the fountain, is competent: *Buffum v. Harris*, 5 R. I. 243. So, an opinion as to whether or not an embankment against the overflow of the sea caused the choking up of a harbor: *Folkes v. Chadd*, 3 Doug. 157. And the opinion of an engineer experienced in judging of the soundness of timbers, as to whether the decay of a sleeper in a gutter-crossing was recent or of long standing, is admissible: *Indianapolis v. Scott*, 72 Ind. 196. The fact that the information upon which an engineer bases his opinion is derived mostly from books does not render the opinion incompetent: *Central R. R. Co. v. Mitchell*, 63 Ga. 173. An engineer who has planned and superintended bridge-building, though not a practical bridge-builder, may testify as to the probable cost of building a bridge: *Bryan v. Branford*, 50 Conn. 246.

RAILROAD EMPLOYEES AS EXPERTS.—1. What Questions may Give Opinion upon.—It has been held that the opinion of an experienced engineer, as to what was a safe rate of speed for a locomotive, running backwards, and as to the effect of striking an animal on the track in such a case, was competent: *Cooper v. Central R. R.*, 44 Iowa, 134. So a railroad expert may testify as to whether or not switching was done in the usual manner and with the usual caution, in a particular case: *Houston etc. R. Co. v. Cowser*, 57 Tex. 293. So the question whether a railroad was finished at a certain date has been held a subject for expert testimony: *Hilton v. Mason*, 92 Ind. 157. But a better ground for the admission of the testimony in that case would seem to have been that the question was one of fact with which the witness was acquainted. Here, as in all cases of expert testimony, if the question is one of mere fact, or within the competence of an ordinary jurymen to form an opinion upon, the opinion of an expert is inadmissible; such as the question whether a cattle-guard was necessary at a particular point: *Amstein v. Gardner*, 134 Mass. 4. So, a question as to the speed of a passing train: *Detroit etc. R. R. Co. v. Van Steinburg*, 17 Mich. 99; or as to whether a target at a switch could be seen by the light of the switchman's lantern: *Weaver v. Keokuk etc. R. R. Co.*, 45 Iowa, 246; or as to how far one should retire from the track to escape injury from a passing train: *Chicago etc. R. Co. v. Moranda*, 108 Ill. 576; or as to the meaning of a notice to passengers, posted on the doors of the cars: *Macon etc. R. R. Co. v. Johnson*, 38 Ga. 409; or as to what is the proper time for removing old brass from car-wheels, in an action for injury to an employee poisoned while engaged in such work: *Kitteringham v. Sioux City R. Co.*, 62 Iowa, 285; or as to whether or not certain signals were "reasonable" or prudent: *Hill v. Portland etc. R. R. Co.*, 53 Me. 438; or as to whether or not a section-man was "a careful, prudent, and attentive man:" *Bryant v. Central etc. R. R. Co.*, 56 Vt. 710; or as to whether or not a brakeman was careless in coupling cars: *Hopkins v. Indianapolis etc. R. R. Co.*, 78 Ill. 32; or that a brakeman would not have been hurt if a car had approached at a proper rate of speed: *Kansas etc. R. Co. v. Pearsey*, 29 Kan. 169. But in *Muldorney v. Illinois etc. R. R. Co.*, 36 Iowa, 462, it was held that the opinions of brakemen, baggage-masters, and conductors as to the danger incurred by a brakeman in coupling cars, owing to the improper matching of the draw-heads, might be received.

2. Who Competent as Experts in Such Cases.—An engineer is competent to testify as to the possibility of stopping a train within a certain distance: *Bellefontaine etc. R. R. Co. v. Bailey*, 11 Ohio St. 333. So a brakeman familiar with a certain kind of brakes may testify as to how soon a train can be stopped with them: *Mott v. Hudson R. R. Co.*, 8 Bosw. 345. So a mail agent accustomed to observe such matters, though not connected with the management of a train, may testify as to the speed at which a train must have been moving to be stopped at the usual point: *Detroit etc. R. R. Co. v. Van Steinburg*, 17 Mich. 99. But a person having no experience respecting the stopping of trains cannot testify as to how long it will take to stop a train: *Manhattan etc. R. R. Co. v. Stewart*, 30 Kan. 226. A machinist, long connected with trains, may give an opinion as to what threw a train off the track: *Seaver v. Boston etc. R. R. Co.*, 14 Gray, 466. A road-master whose duty it is to inspect ties may give an opinion upon the quality of certain ties: *Jeffersonville R. R. Co. v. Lankam*, 27 Ind. 171. So a baggage-master may give an opinion as to how far a certain check will carry a trunk: *Lake Shore etc. R. R. Co. v. Lassen*, 12 Ill. App. 659. But it is held in *Hamilton v. Des Moines etc. R. R. Co.*, 36 Iowa, 31, that a brakeman is not an expert as to the proper way to couple

cars when timber projects. But the real ground of decision in that case probably was that the question was not one for expert testimony.

NAUTICAL EXPERTS may testify as to whether it was safe for a tug to tow three boats abreast: *Transportation Line v. Hope*, 95 U. S. 297. So, as to whether a craft was safely moored: *Hayward v. Knapp*, 23 Minn. 430; and as to the safety of the fastenings of a vessel: *Moore v. Westervelt*, 9 Bosw. 538; as to whether certain acts were seaman-like: *Carpenter v. Eastern T. Co.*, 11 N. Y. 574; as to whether a vessel had a proper light at the time of a collision: *Weaver v. Alabama etc. Co.*, 35 Ala. 176. So a nautical expert has been held competent to testify as to whether a particular act, occasioning a collision, was one of prudence and discretion: *Cook v. Parham*, 24 Ala. 21. So a pilot has been admitted to testify as to whether or not it was prudent to employ another pilot, whom he knew, at a certain point: *Hill v. Sturgeon*, 28 Mo. 323. On the other hand, it has been held that a pilot's testimony whether or not a collision was caused by negligence was inadmissible, because that was the very question to be tried: *Croft v. Brooklyn Ferry Co.*, 36 Barb. 201. A question as to whether a canal boatman did all in his power to save his boat was also held inadmissible in an action for negligence, in *Carpenter v. Eastern T. Co.*, 71 N. Y. 574. Nautical testimony as to how deeply a vessel may be loaded without injury was held competent, in *Ogden v. Parsons*, 23 How. 167. A master engineer and steamboat-builder may testify, from the appearance of a fracture in a vessel, and from other circumstances, as to the direction from which she was struck by a collision: *The Clipper v. Logan*, 18 Ohio, 375.

Upon the following questions nautical expert testimony has been held inadmissible because the matters to be determined were within the cognizance of the jury: Whether a vessel was in danger of breaking in two at a particular time: *Rosenheim v. American Ins. Co.*, 33 Mo. 230; whether glassware would have been broken or washed out if stowed in the hold: *New England etc. v. Lowell*, 7 Cush. 319; whether, if the foremast was sprung, the try-sail split, and the standing rigging needed replacing, the master would have known it: *Perkins v. Augusta etc. Ins. Co.*, 312.

FARMERS, GARDENERS, AND STOCKMEN are competent as experts to testify to matters of opinion requiring peculiar knowledge of their particular callings. Thus it is held that a farmer or gardener is competent to express an opinion whether or not drainage is necessary to fit certain land for cultivation: *Bufsum v. Harris*, 5 R. I. 243; so a farmer of experience is competent to say what land would produce if irrigated: *Ellis v. Tone*, 58 Cal. 289; or to give an opinion as to the proper method of using a fertilizer with which he is familiar: *Young v. O'Neal*, 57 Ala. 566; or to estimate the gain in weight per day of a breed of hogs with which he is acquainted: *Frambes v. Risk*, 2 Ill. App. 499. And it has been held also that an experienced farmer or dairyman was competent to say whether milk has been adulterated with water: *Lane v. Wilcox*, 55 Barb. 615. In some localities, perhaps, such a question would be deemed to be a matter of "common observation." But an opinion of an experienced farmer that a wagon was loaded with hay so as to be unsafe on an ordinary road was rejected, in *Bills v. Ottumwa*, 35 Iowa, 109, the question being regarded as not one of science or skill.

An expert stockman may give an opinion as to how many hands are required to drive a herd of mules: *North Missouri etc. Co. v. Akers*, 4 Kan. 453; or to estimate the weight of cattle: *Carpenter v. Wait*, 11 Cush. 257; or to testify to the effect upon cattle of railroad trains disturbing them while grazing: *Baltimore etc. R. R. Co. v. Thompson*, 10 Md. 76.

MECHANICS GENERALLY are, of course, competent to testify as experts upon matters within their respective callings. Thus, a brick-mason may give his opinion as to the capacity of a wall constructed by him to stand a flow of water: *Montgomery v. Gilmer*, 33 Ala. 116; or as to how long it will take for the walls of a house to dry so as to render it fit for occupation: *Smith v. Gugerty*, 4 Barb. 614; a blacksmith as to whether certain horse-shoes are fit for summer or winter use: *Everts v. Middleburg*, 53 Vt. 626; S. C., 38 Am. Rep. 707; a millwright as to the repairs necessary to put a mill in good condition: *Taylor v. French Lumbering Co.*, 47 Iowa, 662; or as to the skillfulness of work done on a mill: *Walker v. Field*, 28 Ga. 237; or as to the quantity of grain a mill will grind, and the value of the water for mill purposes: *Read v. Barker*, 30 N. J. L. 378; or that if a dam were lowered to a given height the mill would not do a certain quantity of work: *Detweiler v. Groff*, 10 Pa. St. 376; a carpenter of experience as to the injury to a house by a faulty construction of the cellar: *Moulton v. McOwen*, 103 Mass. 587; or as to whether a turn-table is safe and of an approved pattern, he being familiar with that kind of work: *Fitts v. Cream City R. R. Co.*, 59 Wis. 323. A practical bridge-builder may give an opinion as to the average life of white-oak timber in a bridge: *Ferguson v. Davis Co.*, 57 Iowa, 601. A shipwright who has examined the decayed timbers of a vessel may testify as to whether or not the "thick streak" could have been removed without discovering the decay: *Cook v. Castner*, 9 Cush. 266; and a ship-joiner may testify whether or not a berth was properly constructed: *Timney v. New Jersey etc. Co.*, 5 Lana. 507. A brick and tile maker who has had large experience in brick-making, but has made tile only two seasons, may testify as to the proper mode of burning tile: *Wiggins v. Wallace*, 19 Barb. 338. The opinion of a machinist and foundryman as to the gearing of a thrashing-machine is competent: *Sheldon v. Booth*, 50 Iowa, 209. So the opinion of a witness skilled in such matters, as to the identity of principle of two mechanical structures or devices, is competent: *Tillotson v. Ramsay*, 51 Vt. 309.

MINING EXPERTS may testify as to the continuity of a vein of ore: *Kahn v. Old Telegraph Mining Co.*, 2 Utah, 174; or as to the causes of the settling and cracking of the earth over a mining tunnel: *Clark v. Willett*, 35 Cal. 534. But the question as to whether or not the ladder-hole in a platform over a mine should have a railing around it or be lighted at night is not a proper subject for mining expert testimony: *Mayhew v. Sullivan Mining Co.*, 76 Me. 100.

INSURANCE EXPERTS.—The opinion of an insurance expert as to the materiality of facts concealed as to the weakness of an insured fort, and as to the probability of its capture, was adjudged inadmissible, in the leading case of *Carter v. Boehm*, 3 Burr. 1905; S. C., 1 Smith's Lead. Cas., 8th ed., 550. So in other cases, the opinions of such witnesses as to the materiality of concealed facts have been rightly declared inadmissible: *Campbell v. Rickards*, 5 Barn. & Adol. 840; *Harford etc. Ins. Co. v. Harmer*, 2 Ohio St. 452. But whether concealed facts would have enhanced the premium is, it seems, a proper subject of expert testimony: *Berthon v. Loughman*, 2 Stark. 258; *Howes v. New England etc. Ins. Co.*, 2 Curt. 229. Whether the fact that an insured house is or becomes vacant increases the risk of fire, is also an improper subject for such testimony: *Luce v. Dorchester etc. Ins. Co.*, 105 Mass. 297; S. C., 7 Am. Rep. 522; *Multry v. Mohawk Valley Ins. Co.*, 5 Gray, 541; *Joyce v. Maine Ins. Co.*, 45 Me. 168; *Cannell v. Phoenix Ins. Co.*, 59 Id. 582; *Kirby v. Phoenix Ins. Co.*, 9 Lea, 142. But testimony to the effect that insurers generally charge greater premiums on vacant houses is competent, it

seems: *Luce v. Dorchester etc. Ins. Co.*, *supra*. And the opinion of experts as to the effect of alterations in the insured premises, or the erection of adjacent buildings, upon the risk, is generally incompetent: *Lyman v. State etc. Ins. Co.*, 14 Allen, 329; *Franklin Fire Ins. Co. v. Gruver*, 100 Pa. St. 266; but see *Kern v. South St. Louis Ins. Co.*, 40 Mo. 19; *Schmidt v. Peoria etc. Ins. Co.*, 41 Ill. 295.

TICONIC BANK v. STACKPOLE.

[41 MAINE, 321.]

NOTARY'S CERTIFICATE OF PROTEST IMPORTS VERBAL NOTICE to the indorser of non-payment of a note, where it states that he "duly notified" the indorser, without other qualification of the word "notified."

VERBAL NOTICE TO INDORSER RESIDING IN SAME TOWN of non-payment of a note is sufficient.

STATEMENT IN PROTEST THAT NOTARY "DULY NOTIFIED" INDORSER of non-payment of a note does not impair its validity, where it appears from the whole protest that notice was in fact legally given.

ASSUMPSIT against the indorser of a note. Plea, the general issue, with a specification of denial of notice of non-payment. The case turned upon the sufficiency of the protest as evidence of notice. By agreement, the case was submitted to the full court upon the evidence.

J. H. Drummond, for the plaintiffs.

S. Heath and Stackpole, for the defendant.

By Court, APPLETON, J. By the revised statutes, chapter 44, section 12, it is enacted that "the protest of any foreign or inland bill of exchange or promissory note or order, duly certified by any notary public under his hand and official seal, shall be legal evidence of the facts stated in such protest, and also as to the notice given to the drawer or indorser in any court of law."

From the protest of the notary public, which by agreement is made part of the case, it appears that on the last day of grace, having the note in suit, he went to the Ticonic Bank, where the same was payable, and presenting the same to the cashier, demanded payment thereof, which was refused, the cashier saying there were no funds there to meet it; and that on the same day he duly notified James Stackpole, esq., the defendant, indorser of said note, of said non-payment. The notice to the indorser, so far as regards time, was duly made, for it was made on the same day the note was protested.

The indorser was notified of "said non-payment," that is, of the non-payment of the note in suit, after presentation at the

bank where the note was payable. "A waiver of notice," remarks Johnson, J., in *Youngs v. Lee*, 12 N. Y. 554, "was held in *Caddington v. Davis*, 1 N. Y. 186, to include demand and all other acts in law necessary to charge an indorser. Upon the same principle, the statement in this notice, dated on the day when the note was payable, must be intended to mean that it had been demanded and payment refused upon the day when it became due." In the present case, the indorser was seasonably notified of all the facts necessary to be communicated to fix his liability.

The protest, which is the language of the notary, is: "I duly notified James Stackpole, indorser of said note, of said non-payment." It is objected that it does not appear in what mode the notice was given, as whether it was verbal or written, and reliance is placed by the learned counsel for the defense upon the case of *Bradley v. Davis*, 26 Me. 45, in which Whitman, C. J., intimates, if the certificate of the notary were to be taken as conclusive, that it should appear in the protest whether the notice was verbal or in writing, and if in writing, how the same was transmitted or where it was left.

In this case there is no qualification of the word "notified" as to the mode of notice. It is the act of the notary, and the notification is to the indorser. In the absence of any qualification, it must be regarded as verbal, and that, as the defendant is a resident of the town where the note was payable, is sufficient.

The exception to the notice arises from the use of the word "duly" as qualifying the word "notified." Had that word been omitted, it is not insisted that the protest would have been defective. But if from the whole protest it appear that in fact notice was legally given, the insertion of "duly" cannot affect or impair the legal notice which otherwise the protest fully shows.

The notice was of all the facts required to charge the indorser. It was in due season, and the right of the plaintiffs to recover must be regarded as having been established.

Defendant defaulted.

TENNEY, C. J., and RICE, CUTTING, and MAY, JJ., concurred.

VERBAL NOTICE OF DISHONOR OF NOTE, SUFFICIENCY OF: See *Stevenson v. Primrose*, 33 Am. Dec. 281; *Glasgow v. Pratt*, 40 Id. 142.

PROTEST STATING "DUE NOTICE" to have been given, sufficiency of: See *Dunn v. Adams*, 35 Am. Dec. 42; as to the form and sufficiency of protest generally, see the note *Dupre v. Richard*, 43 Id. 216-224.

LOVETT v. PIKE. HOWE v. PIKE.

[41 MAINE, 240.]

SHERIFF MAY COMPLETE DEPUTY'S RETURN OF EXECUTION, WHERE DEPUTY DIES after having made a sale of attached goods under the execution, and before finishing and signing his return.

EVIDENCE IS ADMISSIBLE, WHERE DEPUTY SHERIFF DIES WITHOUT SIGNING RETURN of an execution of attached goods, in an action against the sheriff for his and his deputy's default, to show the value and proper disposition, for there being no return, the evidence does not contradict it.

PURCHASE BY DEPUTY SHERIFF AT HIS OWN EXECUTION SALE is a conversion for which the creditor may maintain trover, but he has no ground of complaint if the sale was for a fair price and the proceeds were applied on the execution.

SHERIFF SELLING ATTACHED GOODS AT PRIVATE SALE BEFORE JUDGMENT is liable to account to the creditor only for what he has received, where the sale was for a fair price, and was necessary to prevent loss of the goods.

SHERIFF SELLING ATTACHED GOODS ON EXECUTION, AND FAILING TO RETURN the execution, is liable only for the moneys received, less his expenses, where the sale was for a fair price, and according to law; otherwise he is accountable for their value.

ACTION against the defendant as sheriff for his own and his deputy's default respecting certain goods attached at the suit of the plaintiffs. There was a default, and the case was presented here for hearing and damages. The case appears from the opinion.

Hutchinson, for the defendant.

J. S. Abbott, for the plaintiff.

By Court, APPLETON, J. The present plaintiff, on November 27, 1848, sued out a writ of attachment against Leonard Foster, and placed the same in the hands of Andrew Hall, a deputy of the defendant, who on the same day returned that he had attached "all the goods, wares, and merchandise owned by him (Foster), in the store now occupied by him in Brighton; also attached the shovel-handle blocks stored under the above said store, together with those stored in said Taylor's barn." No schedule or appraisal of the goods then attached was made till a year afterwards. At the May term, 1849, of the district court, the plaintiffs recovered judgment in their suit against Foster, and seasonably placed the execution issued thereon in the hands of said Hall, who advertised and sold the goods attached at public vendue, conforming to the law in advertising and making sale thereof, and indorsed his doings upon the back of the execution

in his handwriting, but deceased without affixing his signature thereto.

The goods attached sold at less than their appraised value. The plaintiffs claim that the defendant should be held liable for their appraised value, without any deduction.

It was held in *Ingersoll v. Sawyer*, 2 Pick. 276, where a deputy sheriff had sold on execution an equity of redemption and given a deed to the purchaser, and died before the return-day without having entered his doings thereon, that the sheriff might lawfully make a return of his deputy's doings, and that the purchaser of the equity had a valid title, notwithstanding the return was made after the return-day. It would seem, in accordance with the case to which reference has been had, that the defendant might have completed the return of his deputy, and that, if done, it would have been valid.

For some reason, the defendant declined acting in this matter, and the inquiry now arises whether he may show by parol the proceeds and expenses of the sale made by his deceased deputy; and if shown, whether, in case there was not want of good faith in his proceedings, the plaintiffs would not be limited by the amount thus proved.

The value and proper disposition of the property attached, as well as the loss or injury suffered by any partial non-compliance with the law, are all matters in dispute, and as to which evidence may properly be received on either side. As the deputy failed to sign his return, the evidence cannot be regarded as contradicting it, for there was none completed.

It seems that the deputy purchased a portion of the goods sold at auction. Such a purchase is undoubtedly a conversion for which trover will lie, though the amount paid therefor, if allowed on the execution, may be shown in reduction of damages: *Perkins v. Thompson*, 3 N. H. 144. But if the sale was for a fair price, and the proceeds are allowed the creditor, he has no just cause of complaint.

It appears that some articles were sold at private sale, and before judgment was rendered. If this had not been done, they would have become valueless. For all such sales the defendant is ready to account. They were sold at fair prices, and no reason is perceived why the defendant should account for more than he has received. By making the sale, the plaintiffs receive the full value of what, by lapse of time, would otherwise have become a total loss; and instead of receiving an injury, have been benefited by the very sales of which they now complain.

From the whole evidence, it satisfactorily appears that the goods attached were mostly sold in accordance with the provisions of law, and at a fair price, and for the benefit of all concerned. In those instances when they were not so sold, the defendant is ready to account for their value.

The defendant should be held liable for the sales of the goods as proved to have been made. From this sum should be deducted the expenses of keeping and selling the same, and judgment should be rendered for this sum, and interest thereon from the date of the sale.

Defendant defaulted for four hundred and thirty-three dollars and forty-eight cents and interest.

TENNEY, C. J., and RICE, CUTTING, and MAY, JJ., concurred.

APPLETON, J. As the attachment in the action of *Howe v. Foster* was subject to that in *Lovett v. Foster*, and as the goods attached did not sell for enough, after deducting the necessary expenses, to satisfy the first attachment, the plaintiff can only recover nominal damages.

As the defendant, at a preceding term, with a full knowledge of all the facts, voluntarily submitted to a default, no sufficient reason is perceived for disturbing the present posture of the case.

Default to stand.

Judgment for one cent damages.

TENNEY, C. J., and RICE, CUTTING, and MAY, JJ., concurred.

OFFICER'S LIABILITY FOR FAILURE TO RETURN EXECUTION: See *Isbam v. Eggleston*, 19 Am. Dec. 714; *Sloan v. Case*, 25 Id. 569; *Laflin v. Willard*, 26 Id. 659; *Fowler v. Lee*, 32 Id. 172; *Fletcher v. Bradley*, 36 Id. 324; *Commonwealth v. Magee*, 49 Id. 509; *Chase v. Plymouth*, 50 Id. 52; *Evans v. Governor*, 54 Id. 172.

PURCHASE BY SHERIFF OR DEPUTY AT HIS OWN SALE: See *Worland v. Kimberlin*, 44 Am. Dec. 785; *Woodbury v. Parker*, 47 Id. 695; *Harrison v. McHenry*, 52 Id. 435, and notes.

MOSES v. ROSS.

[41 MAINE, 360.]

ACTION AGAINST TENANT IN COMMON RECEIVING MORE THAN HIS SHARE OF RENTS and profits of the common property could not be maintained at common law, but under the modern authorities in this country such an action may be maintained where the defendant has actually received more than his share of the entire profits after deducting all reasonable

charges, and the balance is due to the plaintiff, and not to the other tenants, but not otherwise.

TENANT IN COMMON CANNOT MAINTAIN ACTION AGAINST CO-TENANT, USING the common property, for his share of the value of the use, even under the modern American authorities.

ACTION UNDER MAINE STATUTE AGAINST CO-TENANT RECEIVING WHOLE RENTS and profits of the property, or more than his share, is not maintainable unless the declaration alleges that the property has actually yielded rents and profits, and that the defendant has taken the same without the plaintiff's consent.

ASSUMPT to recover the plaintiff's share of the use or rent of a certain printing-press, of which the parties were tenants in common, together with certain other persons, the plaintiffs owning two ninths, the defendant five ninths, and the other parties the residue. It appeared that the defendant had been in the use of the property for more than six years, and that before the action was brought the plaintiffs had demanded pay for said use. The case was submitted to the court upon these facts to award a nonsuit or default, as they might adjudge.

Bronson and Sewall, for the plaintiffs.

John S. Baker, for the defendant.

By Court, **APPLETON, J.** At common law this action could not be maintained. "If two be possessed of chattels personalls in common by divers titles, as of a horse, an ox, or cowe, etc., and if the one take the whole to himself, out of the possession of the other, the other hath no other remedie but to take this from him who hath done to him the wrong to occupie in common, etc., when he can see his time (*quant il poet voir son temps*, etc.):" Co. Lit., sec. 322. An action for money had and received will not lie by one tenant in common against his co-tenant who has received more than his own share of the profits: *Thomas v. Thomas*, 5 Exch. 29. The tendency of decisions in this country has been to do away with the technical difficulties which impeded the recovery of one tenant against another. "In New York it has been frequently held," says Nelson, C. J., in *Cochran v. Canington*, 25 Wend. 410, "that on the sale of a chattel by a joint owner, and receipt of the money, the co-tenant may recover his moiety in the action for money had and received." The same principle applies when the common property has been leased and the rent has been paid: *Brigham v. Eveleth*, 9 Mass. 538. But to authorize a recovery, the funds must have been received and in the hands of the co-tenant against whom the suit is brought. In order to support such an action, it must

appear, not merely that the defendant has received more than his share of the entire profits of the property or estate held in common, after deducting all reasonable charges, but that the balance is due to the plaintiff, and not to the other co-tenants: *Shepard v. Richards*, 2 Gray, 424.

The plaintiffs, failing to make out a case which will authorize them to recover according to the rules of the common law, claim that this action may be maintained under the act, chapter 61, approved August 8, 1848, "giving further remedies to tenants in common." By section 1 it is provided that one co-tenant may maintain an action of special *assumpsit* to recover his share, "whenever any joint tenant or tenant in common shall take and receive the whole of the rents, profits, or income of the joint estate, or more than his share of the same, without the consent of his co-tenant," etc. The declaration contains no allegation that the defendant has taken the common property "without the consent of his co-tenant." Indeed, if such fact has been alleged, it is wholly unsustained by the facts as agreed upon by the parties. The case is equally destitute of any proof that the joint estate has yielded any "rents, profits, or income," without which there is nothing of which the plaintiff has been deprived, or in which he is entitled to share.

According to the agreement of the parties, a nonsuit must be entered.

Plaintiff nonsuit.

RICE, CUTTING, and MAY, JJ., concurred.

RIGHT OF ACTION OF TENANT IN COMMON AGAINST CO-TENANT RECEIVING MORE THAN HIS SHARE OF RENTS AND PROFITS: See *Shepard v. Richards*, 61 Am. Dec. 473, and cases collected in the note thereto.

MITCHELL v. ROCKLAND.

[41 MAINE, 363.]

MUNICIPAL CORPORATION IS NOT LIABLE FOR OFFICERS' UNLAWFUL OR UNAUTHORIZED ACTS, AS A GENERAL RULE.

QUARANTINE STATUTE APPLIES TO VESSELS HAVING OTHER CONTAGIOUS DISEASES ON BOARD AS WELL AS TO THOSE AFFLICTED WITH THE PLAGUE, ALTHOUGH FORMERLY ONLY THE LATTER CLASS OF VESSELS WERE SUBJECT TO QUARANTINE.

HEALTH-OFFICERS CANNOT TAKE POSSESSION AND CONTROL OF VESSELS IN QUARANTINE, TO THE EXCLUSION OF THE OWNERS OR THEIR AGENTS.

CITY IS NOT LIABLE FOR INJURIES TO QUARANTINED VESSEL BY NEGLIGENCE OF HEALTH-OFFICERS, OR THEIR AGENT OR SERVANT, WHERE THEY HAVE UNLAWFULLY TAKEN POSSESSION OF THE VESSEL.

DECLARATIONS OF ALDERMAN ARE NOT EVIDENCE AGAINST CITY OR AGAINST ITS BOARD OF HEALTH, WHEN HE WAS NOT ACTING IN BEHALF OF EITHER.

CASE to recover damages for an injury by fire to the plaintiff's vessel by the negligence of the defendants' health-officers. The court, upon the trial, declined to give certain instructions asked by the plaintiff, and gave certain other instructions, which appear in the opinion, to which the defendants excepted. Verdict for the plaintiff. The facts are sufficiently stated in the opinion.

A. P. Gould and J. O. Robinson, for the plaintiff.

Thacher, for the defendants.

By Court, TENNEY, C. J. It is not in controversy that the *Caroline*, owned by the plaintiff, came into the port of Rockland at the time alleged in the writ, having on board a man sick with the small-pox, a malignant disease, of which he died a few days afterwards; that subsequently to the death and the removal of the body from the vessel, the person who had some agency on board, connected with the sickness of the person deceased, under the health-officers of the city, kindled a fire in a kettle, which he placed on a flat stone lying upon the cabin floor, and caused to be burned in the kettle brimstone, pieces of leather, and old rope, for the purpose of fumigating the vessel and preventing the spread of the disease; that very soon after the fire in the kettle was kindled the vessel was found to be on fire and material injury was done thereto. From what source the fire communicated with the vessel was a question for the jury.

The jury were instructed that if the health-officers of the city of Rockland, as such, took possession and control of the vessel, and having such possession, a fire, by which the vessel was injured, was occasioned by the want of ordinary care of such officers of the city or their servants, the city would be liable for losses thereby occasioned. And it was found by the jury, in addition to the general verdict for the plaintiff, that the officers of the city of Rockland did take the exclusive control and possession of the *Caroline*, and that the injury to the vessel was occasioned by the neglect of the officers of the city or their servants.

It does not appear that any evidence was introduced tending to show that the city, as such, authorized the acts complained of by the plaintiff, or that they were done in pursuance of any general authority from the city to act therefor; or that the acts were expressly ratified by the corporation. But it is insisted in argument that the allowance and payment of the bill of the person who kindled the fire in the kettle, and who had had the charge of the sick man on board the vessel, which was in testimony, was a subsequent ratification of the acts of the health-officers.

But the statute is invoked as authority to the health-officers for their acts, which it is insisted by the plaintiff's counsel renders the city responsible.

It is a general rule that the corporation is not responsible for acts of its officers which are unauthorized or unlawful: *Thayer v. Boston*, 19 Pick. 511 [31 Am. Dec. 157].

The statute relied upon by the plaintiff provides that whenever the selectmen of any seaport town within this state shall be of the opinion that the safety of the inhabitants thereof requires that any vessel which shall arrive there from any port or place should perform quarantine, they may cause such vessel to do so, at such place and under such regulations as they may judge expedient. And any owner, master, supercargo, officer, seaman, passenger, consignee, or other person, who shall neglect or refuse to obey the orders or regulations of the selectmen respecting said quarantine, shall incur a penalty in money, or suffer imprisonment, or both. And a health committee or a health-officer, legally chosen, may perform all the duties and exercise all the authority which selectmen may perform or exercise in requiring vessels to perform quarantine, under the provisions of the statute referred to: R. S., c. 21, secs. 20-22.

The general definition of the word "quarantine," in law, is the term of forty days, during which persons coming from foreign ports with the plague are not permitted to land or come on shore: 5 Jac. Law Dict. 362. The word has been enlarged and modified in its signification by statutes. The restriction against the coming on shore of persons on board of vessels arriving in port is applied to vessels having on board other contagious sickness than that of the plague. But no authority has been found which allows health-officers, by virtue of their power, to cause quarantine to be performed *ex vi termini*, to take the vessel in which such contagious disease is found, into their own possession and control, to the exclusion of the owner or those whom he has put in charge.

The language of the statute requires that the vessel shall perform quarantine in the cases prescribed, and all having connection with the vessel, as owner, master, etc., are required to comply with the regulations of the selectmen or health-officers. This clearly implies, at least, that the owner, and those having possession and control of a vessel under him, shall not be divested of this control and possession by those municipal officers. The statute relied upon by the plaintiff having given no such authority to the health-officers of the city of Rockland (even if

they had taken the steps required by the statute to cause the vessel to perform quarantine) to take the exclusive control and possession of the *Caroline*, the city cannot by the statute alone be held responsible for their acts.

The testimony relied upon by the plaintiff to prove a ratification by the city of the acts of the health-officers, which were not authorized by the statute, does not appear from the case to have been passed upon by the jury. It was a question for their exclusive determination. The right of the plaintiff to recover was made to depend, by the instructions to the jury, upon the facts that the health-officers of the city took possession and control of the plaintiff's vessel; and while in such possession, a fire caused an injury thereto through the want of ordinary and common care of those officers or their servants. These instructions, unqualified as they were, are regarded as erroneous.

The conversation between the witness Mansfield and Alderman Wiggin, while the vessel had on board the man sick with the small-pox, being received against the objection of the defendants, we think was also erroneous. Wiggin was not one of the board of health of the city of Rockland. He was an alderman only. He did not represent the board of health or the city government, and the corporation could not be legally affected by his declarations or acts when he was not acting in behalf of either.

Exceptions sustained.

Verdict set aside, and new trial granted.

HATHAWAY, APPLETON, CUTTING, and MAY, JJ., concurred.

MUNICIPAL CORPORATION, LIABILITY OF FOR MISFEASANCE, MALFEASANCE, AND NON-FEASANCE OF OFFICERS: See *Wallace v. Muscatine*, 61 Am. Dec. 131; *Lorillard v. Monroe*, 62 Id. 120, and cases collected in the notes thereto. The principal case is cited as an authority upon this subject in *Johnson v. Indianapolis*, 16 Ind. 223; *Detroit v. Blackaby*, 21 Mich. 113.

SMALL v. TRICKEY.

[41 MAINE, 507.]

REFERRING COMPARING ACCOUNT WITH BOOK OF ENTRIES IN ABSENCE OF ONE PARTY, the other being present, after the hearing before them has been closed, does not constitute an *ex parte* hearing, where such comparison is not charged to have been fraudulently made, but was in fact made solely to prevent mistake, and the award is not thereby vitiated.

ARBITRATORS EXAMINING WITNESSES IN ABSENCE OF PARTY will justify him in abandoning the reference and demanding a rescission; but if he continues to take part in the proceeding after the fact comes to his knowledge, it is a waiver of the irregularity.

DEBT on an award. Plea, the general issue, with a brief statement of certain special defenses; among others, that the award was made *ex parte*, which was the only point relied on. The case sufficiently appears from the opinion. Default, which was to be taken off if the court should be of opinion that the action could not be maintained.

Sanborn and Rawson, for the defendant.

J. A. Peters, for the plaintiff.

By Court, APPLETON, J. After the parties had introduced such proof as they severally relied upon, and had each presented their views as to the effect of the same, the referees adjourned for a final decision. Before the award was made it was deemed desirable by the referees to verify an account, which had been sworn by a witness to be correct, by comparing the same with the original books of account from which it had been copied. A comparison was made, and the copy was found correct. The party in whose favor the award was made accompanied one of the referees who made this examination, and aided in making the comparison. This was done for the purpose of preventing any possible mistake. It is not alleged that the comparison was fraudulently or erroneously made. This cannot be regarded in any meaning of the phrase as an *ex parte* hearing. No misconduct, partiality, or fraud on the part or the referees is shown to exist.

It was held in the house of lords, in *Drew v. Drew*, 33 Eng. L. & Eq. 9, that where an arbitrator examines witnesses behind the back of one of the parties, such party is justified in at once abandoning the reference, and applying to a judge to rescind the submission; but if he continue after the fact come to his knowledge to attend the subsequent proceedings, this will be a waiver of the irregularity, and he cannot afterwards set aside the award on that ground. But in the present case no witnesses were examined and no evidence was heard. The comparison instituted was a measure of extraordinary precaution on the part of the referees, and for the benefit of the losing party. No error having been discovered, the award was based upon the evidence introduced at the trial, and was entirely unaffected by the subsequent proceeding to which the defendant objects.

No reason is perceived for taking off the default which has been entered.

Default to stand.

TENNEY, C. J., and HATHAWAY, MAY, and GOODENOW, JJ., concurred.

ARBITRATORS PROCEEDING EX PARTE, WITHOUT NOTICE TO OR IN ABSENCE of party, effect of: See *Elmendorf v. Harris*, 35 Am. Dec. 587; *Emery v. Owings*, 48 Id. 580, and the notes thereto.

PENOBSCOT R. R. Co. v. WHITE.

[41 MAINE, 512.]

ISSUING OF NOTICE OF OPENING OF BOOKS OF SUBSCRIPTION TO STOCK by a majority only of the persons appointed by the charter to superintend the organization of the corporation, where the charter provides simply that the books shall be opened under the directions of the persons named, is sufficient, and affords no defense to an action on subscription.

CONTRACT OF SUBSCRIPTION TO CORPORATE STOCK IS COMPLETE as soon as the corporation is organized, and has proceeded regularly to ascertain who are its corporators.

RECORD OF CORPORATION SHOWING REQUISITE NUMBER OF SHARES SUBSCRIBED to authorize its organization, together with the names of the subscribers, etc., to have been duly ascertained and reported by a committee, which report was duly accepted, is sufficient evidence of due organization, in an action upon a subscription to stock, there being no proof to the contrary.

REQUIREMENT OF CHARTER THAT CERTAIN PER CENT OF COST SHALL BE SUBSCRIBED before a railway company shall commence the construction of any section of its road does not affect the organization of the company, and non-compliance therewith will not defeat an action to recover stock assessments against a subscriber.

STOCK ASSESSMENT IS NOT INVALIDATED BY ABSENCE OR ILLEGALITY OF DEBTS of the corporation, where the assessment was made for a lawful purpose.

STOCK SUBSCRIPTION IS NOT INVALIDATED BY IRRESPONSIBILITY OF OTHER SUBSCRIBERS for shares necessary to be subscribed before the organization of the corporation, if such other subscriptions were made and accepted by the company in good faith, the subscribers being apparently responsible, and evidence of their irresponsibility is no defense to an action on a subscription of another shareholder.

DECLARATIONS OF SUBSCRIBER TO CORPORATE STOCK, SHOWING HIS SUBSCRIPTION FRAUDULENT and not accepted in good faith, made long after the organization of the corporation, are not admissible to show that the corporation was not duly organized, in an action on another stock subscription.

REFUSAL OF INSTRUCTION ON FACT, OF WHICH NO SUFFICIENT EVIDENCE to warrant a finding by the jury has been introduced, is not error.

EVIDENCE OF CIRCUMSTANCES OF STOCK SUBSCRIBER'S ATTENDANCE AT MEETING of directors, at which certain assessments were made, and of his signing the call therefor, is immaterial, in an action to recover assessments, such meeting having taken place long after the organization of the corporation, and after its right to make assessments had been perfected.

ASSUMPT to recover assessments on certain shares of stock held by the defendant in the plaintiff corporation. The facts appear from the opinion.

Kent, for the defendant.

Wilson, and Rowe and Bartlett, for the plaintiffs.

By Court, **MAY, J.** 1. The first objection urged in defense of this action is that the notice that books of subscription to the capital stock would be opened at different places was signed by only twelve persons, being not all, but a majority, of the persons named in the first section of the plaintiffs' charter. The third section of the charter provides that such books shall be opened under the direction of the persons named in section 1, and that public notice shall be given thereof, in some newspaper printed in Bangor and Boston. It is not denied that the proper notice was given if the signatures thereto were sufficient. There is nothing in the charter requiring such notice to be signed by all the persons named therein. The fact that the corporators acted upon it, and the defendant among them, so as to organize the corporation, sufficiently shows that it was given under their direction. The provision in the charter, section 3, that if the subscription shall exceed four thousand shares, the same shall be distributed among all the subscribers according to such regulations as the persons having charge of the opening of the subscription-books shall prescribe before the opening of said subscription-books," would seem to indicate that the corporators had authority in this matter of subscription to act through committees to whom their power might properly be delegated. The doings of the corporators, therefore, in fixing the time and the terms of the subscription, and the notice of the appointment of a committee for that purpose, of whom the defendant was an acting member, are without legal objection.

2. It is next objected that the one thousand shares required to be subscribed for the third section of the charter, as amended by the act of 1850, sec. 1, before any organization could take place, were not legally proved to have been so subscribed for; and that for that reason the organization relied upon by the plaintiffs, and the subsequent assessments upon the shares, were unauthorized and void.

It appears from the records of the corporation that at a meeting of the subscribers to the stock, held May 3, 1851, for the purpose of organizing said company, a committee was chosen to ascertain and report whether a sufficient number of shares had been subscribed to authorize an organization, which committee reported that one thousand two hundred and ten shares had been subscribed in said capital stock, being more than one thousand shares, the number required by the charter; and at the same time said committee also reported a list of the subscribers, their several places of residence, and the number of shares subscribed by each; which report was duly accepted, and the corporation was thereupon organized; a code of by-laws was adopted, and a board of directors chosen, of whom the defendant was one; in which office he acted, having been subsequently appointed upon a committee of the directors to negotiate a contract for the construction of the road.

In the case of *Penobscot R. R. Co. v. Dummer*, 40 Me. 172 [63 Am. Dec. 654], the court say that "when the corporation was organized the shares subscribed for were recognized as shares of its stock, and the subscribers thereof as corporators. This was sufficient to complete the contract." The contract in that case was that of subscription, and precisely like that of the defendant in this case. In the present case, the presiding judge at the trial ruled that the fact that one thousand shares had been subscribed, as required by the charter and the terms of subscription, was sufficiently established by the evidence. In the case of *Penobscot R. R. Co. v. Dummer*, just cited, the court further say that "when a corporation has proceeded regularly to ascertain its corporators, and the owners of shares in its capital stock, and has entered them in its records, all parties become thereby *prima facie* entitled to the rights thus secured to them. The records are competent and sufficient evidence of them, unless proof be introduced to destroy their effect." It is not denied but that it appears from the records of the corporation in this case that all this had been done; and as no contrary proof at this stage of the case had been offered, the ruling of the judge upon this point is found to be correct.

3. It is next urged that this action cannot be maintained for the assessments, unless the plaintiffs first show a compliance with the terms of the third section of the act of August 20, 1850, and that seventy-five per cent of the estimated cost had been subscribed for by responsible persons, as therein specified. By this section it is provided that the company shall not engage

in nor commence the construction of any section or sections of the railway until that amount of the estimated cost of such section or sections is so subscribed. A like provision is somewhat considered in *Boston & Providence R. R. Co. v. Midland R. R. Co.*, 1 Gray, 368. This provision does not seem to have any connection with the organization of the company, nor to take from them the power of making assessments, as conferred by their charter, when deemed necessary, however much it ought to influence them in deciding upon the question of the expediency of making such assessments. It is undoubtedly true, as is contended by the able counsel in defense, that the right to assess money upon corporators depends upon the right to use it when assessed and paid; but the right to use it may, without doubt, exist, notwithstanding there is no actual indebtedness on the part of the corporation existing at the time when the assessment is made. It may be, and often is, expedient to make assessments in view of anticipated liabilities to be subsequently incurred in the prosecution of the general purposes for which the corporation was created; but it may be questioned whether it would not generally be much wiser, and would not better promote the pecuniary interests of such corporations, to postpone the making of their contracts until a solvent treasury should insure the prompt performance of them on their part. Contractors then would have no occasion to exact exorbitant prices, because of the uncertainty of their being promptly paid, if paid at all. But whether expedient or not to assess moneys in anticipation of liabilities to be subsequently created, there can, in our judgment, be no doubt of the existence of the power in the plaintiff corporation to make such assessments; and if rightfully made, we know of no authority, and none has been cited, tending to show that such assessments, even though the money should be subsequently misappropriated by the corporation or its agents, would be void; nor can we perceive any reason why such assessments, if made to raise money for the general but legitimate purposes of the corporation, when the corporation, through its directors, had made contracts for the execution of those purposes, should be void, even though it might subsequently turn out that such contracts were invalid for want of authority in the directors to make them. In such a case, the enterprise itself is lawful, being the very one for which the corporation was created; but the mode adopted for its completion is unlawful, being unauthorized by the charter. The moneys are assessed for the legitimate objects of the charter, but the

contracts to secure the accomplishment of those objects are invalid. Such contracts may be avoided, and the moneys raised may, notwithstanding, be appropriated in conformity with the charter for the very purposes for which the corporation was created. It is therefore apparent that the right to make assessments cannot be made to depend upon any actual indebtedness existing at the time, nor defeated by any apparent indebtedness incurred under a contract which was void. It ought, perhaps, rather to be presumed that the corporation will effect the purposes of its charter in some legal way, and that the moneys assessed will be invested for that purpose. The corporation, therefore, are not bound to show a compliance with section 8 of the statute of 1850, before this suit for the recovery of assessments can be maintained.

It is said by the counsel for the defendant that this section imposing a limitation upon the powers of the corporation was inserted in the act of 1850 for the purpose of protecting the subscribers to the stock from unwise appropriations of their money. It may be so; but if so, the subscribers, when they find the corporation of which they are members, or its agents, misappropriating their money, must find a remedy in some other mode than that which is sought and relied upon in this case. No error is found in the ruling upon this point.

4. The defendant, assuming the burden of proof, next offered to prove that the requirements of said section 8 in the act of 1850 had not been complied with, which testimony was excluded. The fact, for the reasons before stated, being immaterial, such evidence was rightly rejected.

5. Proof was next offered by the defendant that of the one thousand two hundred and ten shares subscribed for, and recorded in the books of the corporation, as before stated, at least five hundred shares were subscribed for by persons not actually pecuniarily responsible therefor, and who were not reputed to be responsible for the amount for which they subscribed. Testimony for this purpose was excluded, subject, however, to the qualification that the defendant might offer any evidence tending to show that these subscriptions were not made in good faith; and upon this point the defendant put in such testimony as he chose. Prior to the organization of the corporation, the defendant, by his subscription, agreed to become the holder of twenty-five shares of the capital stock, upon the condition that not less than the least sum required by the charter should be subscribed; and it cannot be doubted that before he can be held

to such subscription it must appear that such condition has been performed. It is said, however, by the court, in the case of *Penobscot R. R. Co. v. Dummer*, 40 Me. 172 [63 Am. Dec. 654], that "if the company obtains subscriptions to the amount required, in good faith, from persons apparently able to pay or to procure others to pay for the shares, it could not have been the intention to render its proceedings illegal and void if those subscriptions should finally prove to be of little value." The charter must receive a reasonable construction if its language will allow it, and there can be no doubt that it requires good faith of the corporation in the exercise of its rights and the performance of its duties.

If the corporation should, for the purpose of making up the amount of stock required before an organization, accept a list of subscribers as shareholders which was composed in part of idiots and town paupers, as suggested by the counsel in defense, such a subscription would not be a compliance with the provisions of the charter; but if, on the other hand, the list appeared to the company to consist of names which might be relied on for the fulfillment of the subscription, they would be justified in proceeding to organize, and their proceedings would be valid, even though it might subsequently be made to appear that some of the subscribers at the time were not of sufficient pecuniary responsibility to pay for their stock, and were not reputed to be so, provided the corporation acted in good faith on their part in the acceptance of such list. From the very nature of the contract of subscription, it must have been within the contemplation of the parties that the shareholders or corporators should determine who were apparently responsible as subscribers, and when they had done so in good faith, the subscribers to the stock must be regarded as bound by such decision. The reputation or fact of pecuniary inability could at most only be evidence upon the question of good faith, and for that purpose the defendant was permitted to prove them if he desired.

6. It is insisted that the evidence offered upon the question of good faith was sufficient to authorize the jury to find that the subscription of Gideon Mayo was colorable and fraudulent, and that the plaintiffs did not act in good faith in accepting it. The case shows that the testimony upon this point consists in the declarations of said Mayo, in relation to his subscription, made at a meeting of the stockholders long after the corporation had been organized. Such declarations were not legally admissible upon the question whether the corporation acted in

good faith at the time of its organization. The defendant himself testifies that he thinks these declarations were made at some meeting after the assessments had been made. The judge was requested to instruct the jury that if Mayo's subscription was not *bona fide*, but colorable, and made in fraud or evasion of the charter, it could not be regarded as a compliance with that provision of the charter which required that at least one thousand shares should be subscribed for before any organization could take place. Whereupon the judge stated that he should instruct the jury that if they believed the evidence the subscription made by Mayo was binding upon him; and the plaintiffs' evidence, if believed, was sufficient to entitle them to recover. Both these propositions, in the judgment of the court, are correct. No opinion was expressed by the judge in regard to the requested instruction, probably because he regarded the evidence in the case as insufficient to authorize the jury to find the fact on which the request was based; nor does this court perceive any sufficient evidence to justify the jury in finding such fact. If the counsel for the defendant thought otherwise, he had the right to have insisted upon the requested instruction, and if given, to have submitted the evidence upon that question to the jury. He did not choose to do so, and may therefore properly be regarded as acquiescing in the opinion of the judge as to the effect and weight of the evidence. As no ruling was given in pursuance of said request, there being no evidence to require it, we are not called upon to determine whether the proposition contained in the request is in conformity to the law in such a case or not.

7. The questions proposed to the defendant by his counsel, with a view to ascertain the circumstances under which he acted in attending the meeting of the directors, held November 26, 1852, when certain assessments were made, and in signing a paper calling that meeting, and which were not admitted by the judge at the trial, may be regarded as rightly excluded, because it was immaterial with what motives or under what circumstances he acted in those particulars. Nothing which was done at the meeting had any tendency to throw light upon the question of the legality of the organization, or the right of the plaintiff to make assessments upon the stock. These had been perfected long before, and the assessments might have been lawfully made, for aught that appears, without his presence.

In view of all the evidence in the case, we perceive nothing erroneous in the orders, rulings, and opinions of the judge who

presided at the trial, and concur with him that if the whole evidence in the case is believed, this action is maintained. The default, therefore, in accordance with the agreement of the parties, must stand.

TENNEY, C. J., and HATHAWAY, J., concurred in the result.

APPLETON and GOODENOW, JJ., concurred.

SUBSCRIPTION TO STOCK OF CORPORATION, WHEN BINDING, AND DEFENSES AGAINST, GENERALLY: See *Wight v. Shelby R. R. Co.*, 63 Am. Dec. 522; *Penobscot R. R. Co. v. Dummer*, Id. 654, and the notes thereto, collecting many cases in this series bearing upon the various propositions laid down in the principal case.

BRADBURY v. JOHNSON.

[41 MAINE, 582.]

REGISTER OF VESSEL IS NOT EVIDENCE OF TITLE, even against the person named in it as owner, without extraneous proof that it was made with his authority or assent, and even then is not conclusive; and it is not evidence in his favor at all, being nothing more than his declaration.

ASSUMPSIT to recover a part of the earnings of a certain vessel. The case appears from the opinion.

B. Bradbury, for the plaintiffs.

Granger, for the defendant.

By Court, RICE, J. To establish their title to the brig, the plaintiffs put into the case a copy of the register, issued at Machias, October 27, 1849, by which it appeared that Albert Pillsbury owned one half, and Martha E. Bucknell, Otis Woodruff, John Mareen, and the legal representatives of Jeremiah Bradbury, one eighth each. Also, a bill of sale, dated June 25, 1851, of one eighth part of the brig from Martha E. Bucknell to the defendant. It was admitted that Bion Bradbury was administrator on the estate of Jeremiah Bradbury.

Plaintiffs also introduced a writ in favor of Albert Pillsbury, Benjamin F. Bucknell, and others, against this defendant, dated January 15, 1852, and the defendant introduced the judgment recovered against him in that action.

To entitle the plaintiffs to maintain the action, they must prove title in themselves. For this purpose the copy of the register is relied upon. The registry acts are considered as institutions purely local and municipal, for purposes of public policy. The register, therefore, is not, of itself, evidence of

property, except so far as it is confirmed by some auxiliary circumstance, showing that it was made by the authority or assent of the person named in it, and who is sought to be charged as owner. Without such connecting proof, the register has been held not to be even *prima facie* evidence to charge a person as owner; and even with such proof, it is not conclusive evidence of ownership; for an equitable title in one person may well consist with the documentary title at the custom-house in another. Where the question of ownership is merely incidental, the register alone has been deemed sufficient *prima facie* evidence. But in favor of the person claiming as owner, it is no evidence at all, being nothing more than his declaration: 1 Greenl. Ev., sec. 494; *Tinkler v. Walpole*, 14 East, 226; *Frazer v. Hopkins*, 2 Taunt. 5; *McIver v. Humble*, 16 East, 169; 1 Stark. Ev., pt. 2, sec. 53; 1 Phill. Ev. 411.

But though the production of the register or certificate in which his name is omitted is conclusive to negative the interest of the assured, yet its production with the name inserted is not in itself, without more, even *prima facie* evidence of his title: *Arnould on Ins.* 1327.

The register cannot be rendered evidence in favor of the person who procured it to be made, though it may be against him: *Ligon v. Orleans Navigation Company*, 7 Mart., N. S., 682. The certificate of registry is not even *prima facie* evidence of ownership: *Pirie v. Anderson*, 4 Taunt. 652; 2 Saund. Pl. & Ev. 237.

In an action against a person as owner, the register, if the oath of ownership is made by himself, is treated as an admission which may be given in evidence to charge him; if made by another person, and his assent thereto is not proved, it is the declaration of another party, which cannot affect him. But when offered by a party to establish his own title, it is simply a proposition to prove his own declarations for his own benefit, and therefore inadmissible for that purpose.

There is no evidence, aside from the register, which tends to prove title in the plaintiff. The writ and judgment in the former case repels such a presumption. They tend to prove that Benjamin F. Bucknell was one of the owners, and there is no evidence that he has parted with his interest. The account rendered by the defendant throws no light upon the subject, as it was rendered against the brig *Agate* and owners, and is the same that was rendered before the commencement of the former action.

We think the evidence introduced wholly fails to establish ownership in the plaintiffs, and therefore, according to the agreement of the parties, the action must stand for trial.

New trial granted.

TENNEY, C. J., and APPLETON, J., concurred.

REGISTRY OF VESSEL NOT EVIDENCE OF OWNERSHIP: See *Lincoln v. Wright*, 62 Am. Dec. 316, and cases cited in the note.

HILL v. NASH.

[41 MAINE, 585.]

IMBECILITY OF GRANTOR not amounting to a total loss of understanding is not sufficient ground to set aside a deed, though it may be a circumstance in determining whether it is fraudulent or not.

JURY ARE JUDGES OF MENTAL CAPACITY of grantor, where a deed is sought to be set aside on the ground of incapacity; and where the evidence is conflicting, the court will not set aside their verdict, though it might have come to a different conclusion.

ACTION to recover land, with rents and profits thereof for six years. The defendant claimed title through mesne conveyances, under a deed from Abraham Nash, the deceased ancestor of Mrs. Hill, one of the demandants, to Holmes Nash, which was sought to be impeached and avoided on the ground of the imbecility of the grantor. Verdict for the tenant, which the demandants moved to set aside as against law and evidence.

J. A. Lowell and R. K. Porter, for the demandants.

G. F. Talbot, for the respondent.

By Court, APPLETON, J. On the twelfth of December, 1836, Abraham Nash conveyed to Holmes Nash, under whom the defendant derives his title, the premises in dispute. The deed is sought to be set aside on the ground of mental imbecility in the grantor at the time of the conveyance.

"A person being of weak understanding is not, of itself, any objection in law to his disposing of his estates, if he be legally *compos mentis*; whether wise or unwise, he is the disposer of his own property; and his will stands as reason for his actions. Neither courts of law nor equity examine into the wisdom or prudence of men in disposing of their estates. The rules of judging of insanity are the same in courts of equity as in courts of law:" Shelford on Law of Lunatics and Idiots, 267.

In *Jackson v. King*, 4 Cow. 207 [15 Am. Dec. 354], the facts

very much resemble those in the case at bar. In that case it was held that to affect a deed at common law, an entire loss of the understanding must be shown, but that weakness of intellect is a fact to be weighed in determining whether the conveyance was fraudulent or not.

It was held in *Beals v. See*, 10 Pa. St. 56 [49 Am. Dec. 573], that an executed contract for the purchase of goods before the day from which the inquest finds the vendee to have been *non compos* cannot be avoided by proof of insanity at the time of the purchase, unless there has been a fraud committed on him by the vendor, or he had knowledge of his condition.

The intellectual capacity of the grantor and the circumstances attending the conveyance were submitted to the decision of the jury, with instructions to which no exceptions have been taken. There was conflicting evidence before them, the force and effect of which was for their consideration. The court might have come to a different conclusion as to the weight of evidence. To set aside a verdict for such a cause merely would be to withdraw the final determination of facts from the jury, and transfer that duty to the court.

The jury have settled the facts in the case, and no sufficient reason is perceived for disturbing their decision.

Motion overruled. Judgment on the verdict.

TENNEY, C. J., and HATHAWAY, MAY, and GOODENOW, JJ., concurred.

INSANITY OF GRANTOR AS AFFECTING VALIDITY OF DEED: See *Sutton v. Reagan*, 33 Am. Dec. 466; *Bensell v. Chancellor*, 34 Id. 561; *Wall v. Hill's Heirs*, 36 Id. 578; *Rogers v. Walker*, 47 Id. 470, and notes.

IMBECILITY AS GROUND FOR AVOIDING DEED OR OTHER CONTRACT: See *Jackson v. King*, 15 Am. Dec. 354, and the note thereto discussing this subject. See also *Owings's Case*, 17 Id. 311; *Clark v. State*, 40 Id. 481; *Smith v. Beatty*, Id. 435; *Jazan v. Toulmin*, 44 Id. 448; *Tracy v. Sackett*, 59 Id. 610.

PERKINS v. PIKE.

[42 MAINE, 141.]

PROPERTY IN VESSEL FOLLOWS KEEL, and if one repairs his vessel with another's materials, the property in her remains in him.

MECHANICS AND MATERIAL-MEN HAVE, BY GENERAL MARITIME LAW, LIEN on foreign vessels for the price of their labor and materials, but not on domestic vessels.

STATUTES OF MAINE GIVE LIEN ON ALL VESSELS to those who perform labor or furnish materials for or on account of the building or repair thereof

for their wages or materials, which lien may be secured by an attachment of the vessel within four days after she is launched, or such repairs are completed.

MATERIAL-MAN'S LIEN ON VESSEL EXTENDS ONLY TO MATERIALS USED in her construction or repair, and not to such as are promised and agreed to be so used.

LIEN IS LOST BY INCLUDING IN SAME JUDGMENT CLAIM for which no valid lien exists and one for which such a lien does exist.

LIEN ON VESSEL IS NOT SECURED BY ATTACHMENT made under a writ which simply commands the officer to attach the goods and estate of the defendant therein named, without anything indicating a lien claim. Such an attachment gives the plaintiff no special or peculiar rights by reason of any materials he may have furnished, but he stands on the same footing as any other creditor, and his rights must be postponed to those of a prior mortgagee of the vessel.

WHERE STATUTE OMITS TO REQUIRE NOTICE TO BE GIVEN to all parties interested in lien cases, the judgment may conclude the parties to the suit, but it cannot bind others.

ASSUMPSIT. The opinion states the case.

• *George W. Dyer*, for the plaintiff.

F. A. Pike, for the defendants.

By Court, APPLETON, J. It appears from the proof that, in December, 1853, one Michael McCurday, or McCurday & Harvell, made a contract with the defendant Pike for supplies for a vessel then building. On May 7, 1854, they gave him a mortgage on the vessel, then in frames, and of the materials then on hand, to secure him for supplies furnished and to be furnished. On August 5, 1854, Thomas Sawyer sold McCurday about twelve thousand feet of plank for the deck of the vessel. On September 15th following, and when only a portion of the deck plank had been used, Sawyer commenced a suit against McCurday for all the deck plank, claiming a lien therefor, and attaching the vessel to secure the same, for which the defendants gave their receipt to the present plaintiff, by whom the attachment was made. Sawyer prosecuted his suit to final judgment, which was rendered in his favor for the amount in suit. The execution was seasonably placed in an officer's hands, and a demand duly made of the receiptors, who refused to give up the vessel.

This action is brought by the officer making the attachment against the receiptors, one of whom, Pike, the mortgagee, denies Sawyer's lien upon the vessel, and claims to hold the same under his mortgage.

"According to the doctrine in the Pandects, if one repairs his vessel with another's materials, the property of the vessel re-

mains in him." "The property in a vessel is supposed to follow the keel; *proprietas totius navis carinae causam sequitur*:" 2 Kent's Com. 360. The same doctrine seems to have been incorporated in and to be acknowledged as part of the common law. It is recognized in *Merritt v. Johnson*, 7 Johns. 473 [5 Am. Dec. 289]. It is fully affirmed in *Glover v. Austin*, 6 Pick. 214. The defendant Pike, having a valid mortgage, duly recorded, shows a good title against all but those having an elder or better title as lien claimants. His title, in point of time, is prior to that of Sawyer. The rights of the parties, therefore, depend upon the existing validity of Sawyer's lien at the time judgment was rendered in his favor.

By the general maritime law, mechanics and material-men have a lien on foreign vessels for the price of their labor and materials, but not on domestic vessels. To extend further protection to the laborer and the material-man, the revised statutes of this state, c. 125, sec. 35, give to those who perform labor or furnish materials for or on account of any vessel building or undergoing repairs, "a lien on such vessel for his wages or materials;" and this lien may be secured by an attachment of the vessel within four days "after said vessel be launched, or such repairs afterwards have been completed."

In the case at bar, one of the builders of the vessel upon which the lien is claimed had purchased of the plaintiff, for the vessel, a quantity of deck plank, which had been delivered. At the date of the suit by the vendor for the price of the planks sold, but a small portion had been used in the vessel. The whole amount sold had not entered into the structure of the vessel till some two or three months after the commencement of the suit by which the lien was to be enforced.

It remains to ascertain the extent of the vendor's lien at the time his suit to enforce it was commenced. Had Sawyer a lien at that time for all the planks sold, or only for those which had entered into and become a part of the vessel? Had he a lien because of the expectation on his part that they would, and of the promise on the part of the builder that they should, enter into and become a portion of the vessel then building? Did the lien attach instantly upon the sale, irrespective of any subsequent use or disposition of the plank? It must be remembered in cases of this description that the controversy is not so much between the vendor and vendee as between the vendor and the mortgagee or general owner of the vessel, to the prejudice of whose interests the lien is asserted. The builder of the

vessel was liable for the lumber, whatever may be the use he may have made of it. The judgment was rightfully rendered against him for the whole amount sold. Was the interest of the general owner liable for the same amount?

The plank were sold for the vessel. They had not then been applied to the purpose for which they were purchased. They might never be. They might be sold or used in building other vessels. Their future use was problematical. If they were used for other vessels, or sold, would a lien attach? It would certainly be a novel doctrine that a lien should attach for materials never used, because of an expectation that they would be used for a particular purpose.

The equity of a lien claim arises from the fact that the labor done and the materials used have increased the value of the thing upon which it has been done, and for which they have been used. The general owner, having been thus benefited, equitably holds his property subject to a lien for what, by accession, has vested in himself, and enhanced the value of his interest in that of which it has become a part.

The law follows and adopts this equity. The lien *in rem* attaches only to the extent of the labor done and the materials used, not for labor hereafter to be done, nor for materials hereafter to be applied. It cannot attach for labor which may never be performed, nor for materials which may never become a part of the vessel. Such was not the lien as to foreign vessels. That was only for labor done and materials used, and no more. The statute of this state was designed only to apply the maritime law to domestic vessels for the same object, and to the same extent: *The Young Mechanic*, 2 Curt. 404; *The Kiersage*, Id. 421; *Phillips v. Wright*, 5 Sandf. 342; *The Hull of a New Ship*, Daveis, 199.

It is apparent, therefore, that Sawyer sued and recovered judgment for materials for which, at the time he instituted his suit, he had no lien. If the mortgagee had wished to relieve the vessel from the attachment, he would have been obliged to pay for only such lumber as had then been used. The lien of the material-man can only be enforced by attachment. It cannot be asserted prospectively. The extent of Sawyer's lien was limited by the materials used, and not by those which might or might not be used. The judgment, therefore, manifestly embraces lumber for which a valid lien then existed and lumber for which there was then no lien. In such case, it has been repeatedly held that the lien is lost: *Bicknell v. Trickey*, 34 Me. 273; *McCrillis v. Wilson*, Id. 286; *Pearsons v. Tincker*, 36 Id. 384.

But a fatal objection to the plaintiff's claim arises from the fact that the writ, by virtue of which the attachment was originally made, and the receipt taken, commanded only the attachment of the goods and estate of the debtor therein named. There was nothing indicating a lien claim. The attachment, therefore, could give the plaintiff in that suit no special or peculiar rights, by reason of any materials he may have furnished toward the building of the vessel. He stands on the same footing as any other creditor, and his rights must be postponed to those of the mortgagee.

The practical difficulty in cases of lien by statute arises from the omission on the part of the legislature to make provision for notice to all persons interested, so that the judgment rendered shall be conclusive upon all. In admiralty, the process is *in rem*, and notice being given, the judgment binds the rights of all. Until provision is made for general notice the judgment may conclude the parties to the suit, but it cannot bind others.

The attachment being subsequent in time to the mortgage, and the writ containing no command authorizing the officer specifically to attach the vessel, the rights of the mortgagee, as here presented, are superior to those of the creditor in the suit in which the attachment was made, and a nonsuit must be entered.

Plaintiff nonsuit.

TENNEY, C. J., concurred in the result.

HATHAWAY and GOODENOW, JJ., concurred.

BAILLEE OF CHATTEL HAS LIEN THEREON for work and labor which have given an additional value thereto: See *Hanna v. Phelps*, 63 Am. Dec. 410, note 414, where other cases are collected.

THE PRINCIPAL CASE IS CITED in *Oliver v. Woodman*, 66 Me. 58, to the point that the statutory lien on vessels gives a laborer's lien a precedence over a prior mortgage; and in *Union State Co. v. Tilton*, 73 Id. 212, to the point that where, by reason of including in judgments non-lien items, plaintiffs have lost their liens, the judgments have still been considered valid as those of general creditors.

AMES v. PALMER.

[42 MAINE, 197.]

COMMON CARRIER HAS LIEN UPON GOODS TRANSPORTED by him, and a right to retain the possession of them, as against the general owner, until his reasonable charges are paid.

TO MAINTAIN TROVER, PLAINTIFF MUST PROVE PROPERTY IN HIMSELF and the right of immediate possession.

COMMON CARRIER'S LIEN DOES NOT DEPRIVE OWNER OF GOODS OF RIGHT to their immediate possession as against a wrong-doer.

LIEN OF FACTOR IS PERSONAL PRIVILEGE WHICH IS NOT TRANSFERABLE, and no question upon it can arise except between the principal and factor. In Maine this principle has been adopted in relation to a statute lien.

SAME CONSEQUENCES ATTACH TO LIEN OF COMMON CARRIERS as to that of a factor.

LIEN IS RIGHT OF DETAINING PROPERTY ON WHICH IT OPERATES until the claims which are the basis of the lien are satisfied.

TROVER for certain rum taken from on board a vessel. Plea, the general issue, and a justification. The defendant, to justify the taking, offered a complaint by Palmer and others, and a warrant and judgment of a justice of the peace. The defendants contended that the plaintiff was bound to show that the freight on the property due to the owners of the schooner which had brought it from Boston had been paid and the lien on it discharged. The other facts appear from the opinion.

White and Palmer, for the plaintiff.

Abbott, for the defendants.

By Court, MAY, J. In this case the jury were instructed that it was incumbent on the plaintiff to satisfy them by proof that he had a right of property in the goods sued for, and the right of immediate possession; and that if they were satisfied from the evidence in the case that the carrier had a lien for the freight, which had not been paid or waived, then the action could not be maintained. Upon the rendition of the verdict, the jury, being inquired of by the court, stated that they found for the defendants, upon the ground that the freight had not been paid and the claim of the carrier had not been waived.

That a common carrier has a lien upon the goods transported by him, and a right to retain the possession, as against the general owner, until his reasonable charges are paid, and that the plaintiff in an action of trover cannot recover without proof of property in himself, and the right of immediate possession, is not questioned by the learned counsel in defense. Such is the law.

It is, however, contended that the right to retain possession of the goods transported, which by the common law attaches to a common carrier to enforce the payment of his charges, is of such a nature that it does not deprive the general owner of the right to immediate possession as against a wrong-doer; and constitutes no bar to the possession of the property, unless set up by the authority of the party holding such lien. Upon examina-

tion of the authorities, we are of opinion that these positions are well maintained.

It has been repeatedly decided, both in England and in this country, that the lien of a factor is a personal privilege which is not transferable, and that no question upon it can arise except between the principal and factor: *Daubigny v. Duval*, 5 T. R. 604; *McCombie v. Davies*, 7 East, 5; *Jones v. Sinclair*, 2 N. H. 319 [9 Am. Dec. 75]; *Holly v. Huggefurd*, 8 Pick. 73 [19 Am. Dec. 303]. In this state the same principle has been adopted in relation to a statute lien: *Pearsons v. Tincker*, 36 Me. 384.

In the case of *Holly v. Huggefurd*, *supra*, it was argued in defense that the lien of the factor so destroyed the right of possession in the general owner, that he could not maintain an action of trespass against an officer who had attached the goods as the property of the factor, but the court decided that such a position was untenable; and Parker, C. J., says that "the lien of a factor does not dispossess the owner until the right is exerted by the factor. It is a privilege which he may avail himself of or not, as he pleases. It continues only while the factor himself has the possession; and therefore, if he pledges the goods for his own debt, or suffers them to be attached, or otherwise parts with them voluntarily, the lien is lost, and the owner may trace and recover them, or he may sue in trespass if they are forcibly taken; for his constructive possession continued notwithstanding the lien."

No reason is apparent why the same consequences should not attach to the lien of a common carrier as to that of a factor. In both cases the nature of the lien is the same. Both are common-law liens, and such a lien has very properly been defined to be the right of detaining the property on which it operates until the claims which are the basis of the lien are satisfied: *Hammonds v. Barclay*, 2 East, 235; *Oakes v. Moore*, 24 Me. 214 [41 Am. Dec. 379]. The object of these liens being the same, their effect must be the same. *Ubi eadem ratio ibi idem jus*. The lien, therefore, of a common carrier does not deprive the owner of the goods of his right to immediate possession, as against a tort-feasor. The judge presiding at the trial therefore erred in instructing the jury that if they were satisfied that the carrier had a lien for the freight, which had not been paid or waived, the plaintiff could not recover.

Exceptions sustained and new trial granted

TENNEY, C. J., and HATHAWAY, APPLETON, and GOODENOW, JJ., concurred.

MASTER OF SHIP HAS LIEN ON CARGO FOR FREIGHT: See *Frothingham v. Jenkins*, 52 Am. Dec. 286, note 288, where other cases are collected.

FACTOR'S LIEN: See note to *Bigelow v. Walker*, 58 Am. Dec. 167, where this subject is discussed; *Winter v. Coit*, 57 Id. 522, note 524, where other cases are collected.

LIEN DEFINED: See *Oakes v. Moore*, 41 Am. Dec. 379, note 382, where other cases are collected.

TROVER, WHAT NECESSARY IN ORDER TO MAINTAIN: See *Brasier v. Ansley*, 51 Am. Dec. 406; *Danley v. Rector*, 50 Id. 242, note 248, where other cases are collected. The defendant in trover cannot show title in a third person with whom he has no privity: *Harker v. Dement*, 52 Id. 670. An outstanding lien in favor of a third person will not defeat the right of a person otherwise entitled to recover in trover against a mere wrong-doer: *Moulton v. Withereell*, 52 Me. 243; *Murphy v. Adams*, 71 Id. 119, both citing the principal case. In *Clough v. Merrill*, 47 Me. 351, the principal case is by mistake cited instead of *Hart v. Hardy*, 42 Id. 196.

EMERY v. WEBSTER.

[42 MAINE, 204.]

PAROL EVIDENCE IS NOT ADMISSIBLE TO CONTRADIOT OR VARY TERMS of a written instrument, but this rule is directed only against the admission of any other evidence of the language employed by the parties in making the contract. The writing may be read in the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties.

PAROL EVIDENCE IS ADMISSIBLE TO EXPLAIN MEANING OF WORDS "OLD CHANNEL," used in a deed describing the land thereby conveyed as "all that part of lot 87, third division of lots lying westwardly of the center of the old channel of Little river stream."

EVIDENCE OF LANGUAGE AND ACTS OF PARTIES TO DEED at the time of its execution, and subsequent thereto, is admissible to show how they construed it, and what they then recognized to be the true boundary.

IDENTICAL MONUMENT REFERRED TO IN DEED MAY ALWAYS BE SHOWN by parol proof.

REPLEVIN for a quantity of hemlock bark which grew on what was called the island in Little river stream, in Belfast. The suit involved the question of title to this island. The other facts are sufficiently stated in the opinion.

White and Palmer, for the defendant.

N. Abbott, for the plaintiff.

By Court, **HATHAWAY, J.** The rights of the parties in this suit depended upon the question whether or not "the island in Little river stream, in Belfast," from which the bark re-

plevied was taken, was conveyed to the plaintiff by Jonathan White and others by their deed of December 15, 1828.

The land conveyed by that deed was described therein as "all that part of lot 87, third division of lots lying westwardly of the center of the old channel of Little river stream."

The controversy was whether the channel on the east or the west side of the island was the channel designated in the deed as the boundary of the land conveyed.

The defendant introduced evidence of the conversation and conduct of the parties to the deed at or about and subsequent to the time of its execution, tending to show that they agreed upon the western channel as the "old channel" mentioned in the deed as the boundary; that they understood that to be the old channel, and so called it, and that they intended and fixed upon it as the boundary, and that the grantors and the plaintiff, the grantee named therein, so construed the deed then, and for many years after that time.

By the instructions of the presiding judge, to which exceptions were taken, the jury were limited in their application of the evidence to the single subject of the antiquity of the channel, and all parol evidence to show what the parties meant by the term "old channel," as used in the deed, was excluded from their consideration.

The rule of law is unquestioned that parol evidence is inadmissible to contradict or vary the terms of a valid written instrument, but the rule is directed only against the admission of any other evidence of the language employed by the parties in making the contract.

The writing may be read by the light of surrounding circumstances in order more perfectly to understand the intent and meaning of the parties.

The question being, What did the parties mean and understand by the written language used, and to be interpreted? Parol evidence of extraneous facts and circumstances is often indispensable to aid in obtaining a true answer to the inquiry: 1 Greenl. Ev., 8th ed., secs. 277, 282, 295, 295 a.

By reason of the unstable character of the channels of streams or rivers which flow through alluvial lands, it would be often impossible to affix any definite meaning to the term "old" in a deed, when applied to the channel of such a stream as a boundary of land, without the aid of such parol evidence of the language or acts of the parties at the time of or subsequent to the conveyance.

The phrase "old channel" might have been, and probably was, merely conventional between the parties to the deed. It was uncertain and indefinite, and therefore subject to explanation. Both channels may have been old. They might, in the lapse of time, have been alternately denominated new and old, according to the number of successive years during which the action of frequent freshets had permitted either of them to constitute the principal channel.

There is nothing in the meaning of the word "old," as used in the deed, so positive as to exclude parol evidence by which to show what the parties thereto intended by it.

The plaintiff is the original grantee of Jonathan White and others; he must have known whether or not the island was intended to be included in his deed, and consequently, where the true boundary was; hence, evidence of his language and acts, at the time of the conveyance and subsequently, tending to show that he recognized the western channel as the boundary, and so construed his deed, was legally admissible and proper for the consideration of the jury concerning the questions of the true boundary of the land: *Stone v. Clark*, 1 Met. 378 [35 Am. Dec. 370].

"Whether parcel or not of the thing demised is always matter of evidence:" *Per Buller, J.*, in *Doe v. Burt*, 1 T. R. 701. The identical monument referred to in the deed is always a subject of parol proof: *Proprietors of Claremont v. Carlton*, 2 N. H. 373 [9 Am. Dec. 88]; *Lincoln v. Fernald*, 5 Greenl. 496; *Wing v. Burgis*, 13 Me. 114.

In *Waterman v. Johnson*, 13 Pick. 261 (a case similar to this), it was held competent to prove by parol evidence that a certain line was agreed on and understood at the time of the conveyance as the boundary of the "pond" which was named in the deed as one of the boundaries of the land conveyed.

The doctrine which would authorize the admission of parol evidence in this case to prove the establishment of the western channel as the boundary is not distinguishable in principle from that of the uniform decisions of this court, in which parol evidence has been always received to identify monuments, set up or marked as boundaries of land conveyed.

The error in the instructions was in assuming that the term "old channel," as a boundary, had a known, definite, and certain meaning, like "the town line," or "the sea-shore," which terms would need no explanation as boundaries.

It was as competent to prove by parol that the western chan-

nel was established as the boundary, as it was to prove by the same kind of evidence what was the old channel.

Exceptions sustained.

TENNEY, C. J., and RICE, MAY, and GOODENOW, J J., concurred.

APPLETON, J., delivered a dissenting opinion.

PAROL EVIDENCE IS NOT ADMISSIBLE to contradict or vary terms of written contract: See *Iruia v. Ivers*, 63 Am. Dec. 420, note 423, where other cases are collected; *Ralliff v. Ellis*, Id. 471, note 474; *Cannon v. Folsom*, Id. 474, note 477. But in *Bolton v. Bolton*, 73 Me. 307, it is said, citing the principal case, that the law allows the expounder of a deed to place himself in the same situation as the parties to the instrument, and to view the circumstances as they did, and so judge of the meaning of the words used by them and of the correct application of the language employed by them.

ADMISSIBILITY OF PAROL EVIDENCE TO EXPLAIN DESCRIPTION IN DEED: See *Morton v. Jackson*, 40 Am. Dec. 107, note 109, where other cases are collected.

HEYWOOD v. HEYWOOD.

[42 MAINE, 229.]

MONEY IS NATURAL STANDARD OF VALUE, and when the sum in a contract to be paid by one party to the other is expressed in dollars and cents, it should not be rejected for a more uncertain standard.

NO WORD IN CONTRACT IS TO BE TREATED AS REDUNDANCY if any meaning reasonable and consistent with other parts can be given to it.

CONTRACT TO PAY CERTAIN SUM IN SPECIFIC ARTICLES at an agreed price is for the benefit of the debtor, who has the election to pay in that manner or in money at the time agreed upon, and a tender made by him at the exact time of payment, in lawful money, is a bar to an action on the contract.

WHERE LESSEE AGREES TO PAY FORTY DOLLARS A YEAR IN SPECIFIC ARTICLES at an agreed price as rent for premises, if he tenders the articles at the time agreed upon the lessor is bound to take them at the stipulated price; but if the lessee fails altogether to deliver the articles, the standard of the damages to the lessor is the forty dollars agreed upon by them in the contract.

ASSUMPSIT. The judge instructed the jury that if they found rent due on the lease for a year, and the failure of the defendant to deliver the hay, corn, wheat, etc., in payment, the measure of damages, so far as the articles were concerned, would be the market value of the articles at the time and place where the rent fell due. The verdict was for the plaintiff, and the defendant excepted to the instruction by the court. The other facts appear from the opinion.

North and Fules, for the defendant.

Drummond, for the plaintiff.

By Court, TENNEY, C. J. This action is for the recovery of the arrears of rent claimed to be due under a lease, in which is the following: "And the said Zimri, on his part, agrees to pay annually to the said Anna W., for the use and rent of the premises, the sum of forty dollars, together with two lambs, and two good fleeces of wool, per annum, etc., the payment of said sum of forty dollars to be made after the following manner, to wit: ten bushels of corn at seventy-five cents per bushel, eight bushels of wheat at one dollar per bushel, twenty-five bushels of potatoes at one shilling per bushel, and two tons of hay at five dollars per ton; the balance in cash, or country produce at cash price."

Among other things, the plaintiff claims the entire rent of the premises for one year, ending December 11, 1852, and insists that she is entitled to the amount of the actual market value at that time of ten bushels of corn, eight bushels of wheat, twenty-five bushels of potatoes, and two tons of hay, in addition to the ten dollars to be paid in cash, or in country produce at cash price, when these articles are shown to have had a value greater than that stated in the lease. On the other hand, the defendant resists this construction of the contract, and contends that, failing to deliver the specific articles, he is bound to account only for the rent at its agreed value in cash.

The legal question presented in this case is one which has been before judicial tribunals in other states, and courts upon it have come to different conclusions. The doctrine, which the plaintiff insists is the true one, has been adopted in *Meason v. Philips*, Add. 346; and in *Edgar v. Boies*, 11 Serg. & R. 445, in Pennsylvania. In New York, also, the same doctrine was held by the supreme court, in *Gleason v. Pinney*, 5 Cow. 152, 411; in *Clark v. Pinney*, 7 Cow. 681; and in the state of Tennessee, as appears by the case of *McDonald v. Hodge*, 5 Hayw. (Tenn.) 85. The contrary was maintained in Connecticut, in *Brooks v. Hubbard*, 3 Conn. 58, 60 [8 Am. Dec. 154]; in New York, in *Smith v. Smith*, 2 Johns. 235 [3 Am. Dec. 410]; also by the court of common pleas, in the case before cited, of *Gleason v. Pinney*, whose opinion was adopted in the court of errors unanimously, and the decision of the supreme court was reversed: *Pinney v. Gleason*, 5 Wend. 393 [21 Am. Dec. 223].

In most of the cases referred to the market price of the arti-

cles at the time stipulated for their delivery was less than that agreed upon in the contract; and on this point Chancellor Walworth remarks, in referring to the case cited of *Clark v. Pinney*, 7 Cow. 681, upon giving his opinion in *Pinney v. Gleason, supra*: "The particular terms of the contracts are the same in both; and the only difference in the cases is that in one the salt was worth more, and in the other less, than the price specified in the note. The same principle, therefore, is applicable to each."

When we apply elementary principles to the question, difficulties which at first appear formidable will vanish. Money is the natural standard of value, which theoretically is not supposed to fluctuate from year to year; and when the sum in dollars and cents is expressed in a contract, to be paid by one to the other, it should not be rejected for a more uncertain standard. Hence, a note payable in specific articles is considered of less value than a note payable in cash: Chipman on Cont. 35.

Pothier holds that the agreements for paying anything else in the place of what is due are always presumed to be made in favor of the debtor, and hence he has always the right to pay the particular thing which he has admitted was due, and the creditor cannot demand anything else; and as an illustration, he puts the case of the lease of a vineyard at a fixed rent, expressed in the terms of commercial currency but payable in wine. In such a case, the lessee is not bound to deliver wine, but may pay the rent in money: 2 Ev. Pothier, 347, No. 497. Mr. Chipman supposes a case of a note for one hundred dollars, payable in wheat at seventy-five cents a bushel, and concludes that it is within the principle referred to by Pothier that the debtor may pay the one hundred dollars in cash, or in wheat at the price specified. He considers the fair interpretation of the contract to be, the creditor agreed to receive wheat instead of money, and to avoid disputes about the price, they fixed it in the contract. If at the time fixed for the payment of wheat it should be worth fifty cents, when the price fixed in the contract was seventy-five cents, he may pay his debt at seventy-five cents. That if the parties had intended the risk in the rise and fall of the wheat should be equal with both, the contract would have been simply for the payment of a certain number of bushels: Chipman on Cont. 35.

It is a general principle that no word in a contract is to be treated as a redundancy if any meaning reasonable and consistent with other parts can be given to it.

In this case, if the principle contended for in behalf of the plaintiff should be applied, this contract must be treated the same as a contract to pay the specified quantities of corn, wheat, potatoes, and hay, together with ten dollars in cash, or country produce at cash price, and two lambs, and two fleeces of wool, without the mention of the sum to be paid in the commercial currency. So were the decisions which are favorable to the plaintiff. But this doctrine cannot be admitted. The important agreement that the sum to be paid was one fixed by the standard of the law cannot, with propriety, be disregarded, and the liability be determined by one which is uncertain, changing from year to year, from month to month, and even from day to day; depending, too, upon opinions of men, which may differ essentially, according to their places of residence, the business in which they are severally engaged, and their various recollections of facts, which are the basis of their opinion, after they have occurred.

According to written authorities cited, the contract to pay a certain sum in specific articles at an agreed price being for the benefit of the debtor, he has the election to pay in that manner, or in cash, at the time agreed upon; and a tender, if made at the exact time of payment, in lawful money, would bar an action on the contract. This is a corollary from the principles of these authorities.

In this case the value of the rent was fixed at the sum of forty dollars for each year, payable at its termination. It is manifest that the parties designed to avoid all uncertainty touching the value of the articles to be paid for the three fourths of the yearly rent, and fixed the prices themselves. The plaintiff undoubtedly regarded it a less evil to incur the risk of having her rent paid in articles, which she was willing to receive, at a price above the market value at the time of payment, than to ascertain the true value, and perhaps be subjected to litigation on account of a difference of opinion between herself and the lessee. If he should tender the articles at the day, the rent was paid so far, notwithstanding the real value was much greater or less than that agreed upon; no appeal could lie from their own decision of the value. If the lessee failed to deliver the articles altogether, the standard of the damages to the lessor had been fully agreed upon by them in the contract. If the rent was forty dollars a year, and corn, wheat, potatoes, and hay, to the amount of three fourths of that sum, were worth a certain and fixed price by their agreement, it is not perceived that they

designed to seek the uncertain information of the amount to be substituted for these articles, but should be as they had determined, and conforming to the whole value of the rent as agreed.

It is true, as contended by the plaintiff's counsel, that when the market value of the specific articles named in the lease should be below the standard agreed upon, the rent being received therein would fall short of its estimated value; and, in a reversal of this supposed state of the market, the payment in cash could never exceed this sum. It is true, the plaintiff was thus exposed; but the contract cannot, therefore, be changed if its construction is obvious. Both parties must abide by the contract according to their intention as derived from the lease itself. The value of the rent was matter of agreement between the parties, and was not subject to be changed by the omission to deliver the articles in which it was contemplated payment could have been made.

Exceptions sustained. New trial granted.

APPLETON, J., concurred.

RICE, J., delivered a dissenting opinion.

SPECIFIC PROPERTY, WHEN PAYMENT MAY BE MADE IN: See *Ryan v. Dunlap*, 63 Am. Dec. 334, note 339; *Maxville v. Gay*, 60 Id. 379; *Ralston v. Wood*, 58 Id. 604, note 609; *Hatch v. Barnum*, 56 Id. 59, note 61; *Crutchfield v. Robins*, 42 Id. 417, note 419.

MEANING OF TERM "MONEY:" See *Crutchfield v. Robins*, 42 Am. Dec. 417, note 419, where other cases are collected.

CONTRACT FOR DELIVERY OF SPECIFIC ARTICLES cannot be converted into a contract for the payment of money without the consent or default of the promisor: *Smith v. Davis*, 60 Am. Dec. 390.

AGREEMENT TO PAY IN KIND, IF NOT DISCHARGED AT MATURITY by a delivery of the goods, may be treated by the promisee as an agreement to pay in cash: *Wainwright v. Straw*, 40 Am. Dec. 675.

NOTES PAYABLE IN SPECIFIC ARTICLES: See *Tibbets v. Gerrish*, 57 Am. Dec. 307, note 310, where other cases are collected.

STINSON v. CITY OF GARDINER.

[42 MAINE, 248.]

ALL PERSONS, INCLUDING CHILDREN, HAVE RIGHT TO PASS AND REPASS on public roads, so long as they violate no laws for the common good, or for the protection of individuals.

ANY PART OF HIGHWAY MAY BE USED BY TRAVELER, either on business or pleasure, and in such manner as may suit his convenience or taste, provided he conforms to all laws and well-settled rules connected with such use.

SAFETY AND CONVENIENCE FOR TRAVELERS AND THEIR TEAMS AND VEHICLES are the rule by which it is to be determined whether or not there be any defect, or want of repair, or sufficient railing upon highways.

PUBLIC HAVE NO RIGHT IN HIGHWAY EXCEPT RIGHT TO PASS and repass thereon.

CHILD USING HIGHWAY AS PLAY-GROUND, AND NOT FOR TRAVEL, cannot recover for an injury received during such use, although the injury resulted from a defect in the road.

ACTION to recover damages for personal injuries received by the plaintiff, a minor, in consequence of an alleged want of a sufficient railing on the highway. The facts sufficiently appear from the opinion.

Bradbury and Joseph M. Meserve, for the plaintiff.

C. Danforth, for the defendants.

By Court, TENNEY, C. J. The obligation of the defendants to keep in repair the highway on which the injury to the plaintiff is alleged to have been received, the defective condition of the railing at the time of the injury, and reasonable notice thereof to the city of Gardiner, are admitted.

Evidence was introduced by the plaintiff tending to prove that she was returning from school to her father's house; that she passed on to a sidewalk elevated some eleven feet above the ground, on the outside of the way; that she stopped and leaned against a post to which the railing had been nailed, or against the railing, which gave way, having been loose and swinging for some time; and that she was thrown to the ground and seriously injured.

The defense was, that at the time and near the place of the accident, the plaintiff was at play in the road with another, and that the two were scuffling, and that she run or was forced with some violence against the railing; and that the accident happened while she was on the road for a purpose and doing acts which exonerate the city from liability to damages for the injury received.

From the exceptions, it is manifest that the testimony introduced by one party was in conflict with that introduced by the other in some respects, particularly in reference to the plaintiff's acts at the time of her fall.

All persons have the right to pass and repass upon public roads, so long as they violate no laws for the common good, or for the protection of individuals. Within these restrictions they are entitled to the use of the highway for the purposes of travel; whether the object of that travel is business or pleasure;

whether they pass on foot, with carriages, or in the various modes which each individual may choose to adopt. Any part of the highway may be used by the traveler, and in such direction as may suit his convenience or taste, provided he therein conforms to all laws and well-settled rules connected with such use. Children are not restricted in passing and repassing upon the streets and roads more than adults. And the same rules are to be applied equally to all in regulating the use of highways for the objects designed.

Safety and convenience for travelers, and their horses, carts, and carriages, are the rule by which it is to be determined whether or not there be any defect or want of repair, or sufficient railing upon highways: R. S., c. 25, sec. 57. It being settled, in a given case, that the way is defective in some of the particulars wherein the statute requires that it shall be safe and convenient, a remedy is given to persons referred to, in the same statute, who shall receive any bodily injury, etc., through such defects: Sec. 89.

It is for travelers, and their horses, carts, teams, and carriages, that these highways are to be opened, kept in repair, and amended from time to time. And the statute has not provided that they shall be kept safe and convenient for any others. A street or highway may be put to a use at a particular time and place, and that use be entirely foreign to the design of passing and repassing thereon, for the purpose of travel, according to the meaning of the statute; and the appropriation may require a much better condition of the ground than would be necessary to make it safe and convenient for travelers. Hence, the rule of safety and convenience for the traveler might differ essentially from that which would be applied in a use not provided for or contemplated by the statute.

The public have no right in a highway, excepting the right to pass and repass thereon: *Stackpole v. Healy*, 16 Mass. 33 [8 Am. Dec. 121]. "Subject to the right of mere passage, the owner of the road is still absolute master. The horseman cannot stop to graze his steed without being a trespasser; it is only in case of inevitable, or at least accidental detention, that he can be excused even in halting for a moment:" *Pearsall v. Post*, 20 Wend. 111. In *Peck v. Ellsworth*, 36 Me. 393, Shepley, C. J., in delivering the opinion of the court, says: "Towns are made liable for injuries by the statute only to the extent of its provisions." And it is held in that case that a party can recover of a town damages for an injury received on the highway only

when the defect or want of repair will prevent the way from being safe and convenient for travel.

If a circus company should appropriate a part of a public highway for the exhibition of their feats in horsemanship, or other acts of agility, entertaining no design to use that part of the way as travelers, could one of that company have any ground for a claim of damages for bodily injuries, or other losses, on account of any defect therein against the town or city in which the way was located? When children appropriate a part of the road for their sports, and cease to use it as a way for travel, the town or city through which the way passes is not responsible for injuries which may be received by any of the children so engaged, although the injuries may take place through a defect in the road.

The defendants requested the judge to instruct the jury that if the plaintiff at the time of the accident was using the highway as a play-ground, and not as a traveler, she could not recover. This instruction the judge refused to give, and it was not given, in substance, in any of the remarks made by the judge to the jury. The facts assumed in this request had some support, at least, in the evidence as reported in the exceptions, and therefore the instructions requested were not for a case purely hypothetical. If the plaintiff was using the road as a play-ground, and not as a traveler, the use thereof for purposes of travel must be regarded as entirely suspended, and she was using the ground for an object altogether different from that contemplated by the statute.

We think, according to well-settled principles, the instructions should have been given.

Exceptions sustained, verdict set aside, new trial granted.

RICE and APPLETON, JJ., concurred.

CUTTING, J., did not sit.

GOODENOW, J., delivered a dissenting opinion.

LIABILITY OF TOWNS FOR INJURIES ARISING FROM DEFECTS IN HIGHWAYS: See *Savage v. Bangor*, 63 Am. Dec. 658, note 661, where other cases are collected; *Kimball v. Bath*, 61 Id. 243, note 245. One who while using the highway simply for the purpose of play meets with an injury by reason of a defect therein cannot maintain an action for damages against the city or town bound to keep the same in repair: *Blodgett v. City of Boston*, 8 Allen, 241, citing the principal case. The Maine act giving a remedy for an injury resulting through a defect or want of repair in a highway relates only to those for whom ways are established, to wit, travelers: *O'Connell v. Lewiston*, 65 Me. 17, citing the principal case. So where a person uses the highway wholly

for the purpose of horse-racing, he cannot recover for injuries that happened to him merely because the town did not afford him and his horse a safer and more perfect track: *McCarthy v. Portland*, 67 Id. 169, citing the principal case.

RIGHTS OF PUBLIC IN HIGHWAYS: See *Troy v. Cheshire R. R. Co.*, 55 Am. Dec. 177, note 190, where other cases are collected.

THE PRINCIPAL CASE IS CITED in *Orcutt v. Kittery Point Bridge Co.*, 53 Me. 505, to the point that a toll-bridge company is not bound to erect or maintain railings for persons to sit upon or lean against while they stop to recover from fatigue.

BENSON v. SMITH.

[42 MAINE, 414.]

EVERYTHING ESSENTIAL TO TITLE UNDER STATUTE MUST APPEAR of record **POWER OF SHERIFFS AND THEIR DEPUTIES TO SERVE AND EXECUTE WRITS** and precepts directed and committed to them is statutory, and unless conferred by the statute expressly or by fair implication, it does not exist.

MODE IN WHICH WRITS AND PRECEPTS SHALL BE SERVED and executed is regulated by statute, and unless substantially conformable thereto, the doings of the officer are invalid.

SEIZURE OF PROPERTY UPON EXECUTION IS NECESSARY ACT in making a legal sale. And subsequent proceedings, in order to vest the title in the purchaser at execution sale, have reference to the time of the seizure, and depend upon the state of the title as it then was.

PROPERTY NOT WHOLLY IN COUNTY IN WHICH SHERIFF WAS COMMISSIONED to act could not be seized or sold by him prior to the passage of the act of January 28, 1852; and notices of sale of property, part of which was in a county to which his authority did not extend when he seized it, are nullities, and a sale made after and pursuant to such notices is void.

MAINE STATUTE OF 1852 REQUIRES NOTICE OF EXECUTION SALE TO BE GIVEN at least thirty days before the sale, and a notice which is ineffectual until ten days before the sale is insufficient. That act does not dispense with any proceeding previously necessary to make a sale on execution valid.

BILL in equity, brought to obtain a decree of the court that the plaintiff might be permitted to redeem the property of the Buckfield Branch Railroad Company, which had been mortgaged by said company to the respondent, upon his paying the sum which should be found to be due on said mortgage. The plaintiff claimed to derive title to the right of redemption by virtue of a sale on execution made by Jesse Drew, a deputy sheriff, to David Stanley, who conveyed it to F. O. Libby, from whom the plaintiff held a conveyance. The officer who made the sale was commissioned for Oxford county, and the property lay partly in that county and partly in the county of Cumberland. The other facts appear from the opinion.

Shepley and Dana, for the plaintiff.

F. O. J. Smith, pro se.

By Court, TENNEY, C. J. The plaintiff claims to be the owner of the right of redeeming the franchise of the Buckfield Branch Railroad Company, with all the privileges and immunities, together with all personal property and real estate of said corporation, however situated and bounded, within the counties of Oxford and Cumberland, together with all the buildings situate on said premises, including all iron rails, the same having been mortgaged by said corporation to the defendant, by its deed, dated October 29, 1849, under a sale of the same right claimed by the plaintiff, made to David Stanley, on February 7, 1852, and which passed through mesne conveyances to the plaintiff. The sale purports to have been made by Jesse Drew, as a deputy sheriff of the county of Oxford.

The plaintiff seeks a decree under his bill, that he may be permitted to redeem the premises by paying, which he offers in his bill to do, what, if anything, shall appear to remain due, in respect to the principal and interest on said mortgage. The defendant filed his answer to the bill, and among other things relied upon in defense, he insists that said Stanley acquired no right of redeeming the premises under the attempted sale, the proceedings of the officer being ineffectual to vest any interest in him.

Everything essential to a title under the statute ought to appear of record: *Wellington v. Gale*, 13 Mass. 483. And we are to look at the return of Jesse Drew, the deputy sheriff, who returned his doings upon the execution, by authority of which he professed to act, and compare it with the provisions of the statute, touching the sale of such property.

The corporate property of any company in this state, and the franchise of any corporation having the right to receive toll, etc., shall be liable to attachment on mesne process, and to be levied upon by execution for the debts of the corporation, as provided in chapters 94, 114, and 117, of the revised statutes: R. S., c. 76, sec. 17.

By chapter 94, sections 86 and 87, the right of redeeming real estate may be taken and sold on execution; in which case the officer shall give written notice of the time and place of sale, to the debtor, etc., and shall cause notifications thereof to be posted in some public place, where the land lies, and in two adjoining towns, all of which shall be done thirty days, at least, before the

day of sale; and shall also cause an advertisement of the time and place of sale to be published three weeks successively before the sale, in some public newspaper printed in the county where the land lies, etc.

By chapter 117, section 20, of the revised statutes, whenever judgment has been recovered against any company incorporated with power to receive toll, the franchise of such corporation may be sold on execution at public auction; the officer giving notice of the time and place of sale by posting a notification in any town or plantation in which the treasurer, clerk, or any officer of the company, if there be any officer, and if not, where any stockholder, may reside, thirty days, at least, before the day of sale, and by causing an advertisement, etc., to be inserted three weeks successively in some public newspaper, etc., four days before the day of sale.

It is objected by the defendant that the officer who returned upon the execution that he had made sale of the interest, alleged to have previously belonged to the corporation, the debtor in said execution, being a deputy sheriff of the county of Oxford only, according to his return, could not seize and make sale of the mortgagors' right, when the right, attempted to be sold, existed in the county of Cumberland as well as in the county of Oxford; there being no distinction between the part lying in one county and that in the other, in the sale, or in the price received, but the entire right being exposed for sale and sold together.

By the revised statutes, c. 104, sec. 19, "every sheriff and each of his deputies shall serve and execute within his county all writs and precepts to him directed and committed, and issued by lawful authority."

The statutes confer the power upon sheriffs and their deputies; and unless the power is thereby conferred expressly, or by fair implication, it does not exist.

The mode in which writs and precepts shall be served and executed is regulated by statute; and unless substantially conformable thereto, the doings of the officer are invalid.

The seizure of property upon execution, with the view to make sale thereof, is regarded as an important and necessary act in making a legal sale.

Subsequent proceedings, in order to vest the title in the purchaser, have reference to the time of the seizure, and depend upon the state of the title as it then was: *Bagley v. Bailey*, 16 Me. 153.

Again: the statute provides that the seizure on execution of a debtor's right to redeem estate mortgaged shall be considered as made on the day when the notice of the intended sale was given, whether to the debtor, or by posting up notices, or by advertising in the newspaper: R. S., c. 94, sec. 40. A seizure, therefore, of property is contemplated as essential to a valid sale.

It cannot be contended that a sheriff or his deputy can seize or sell property in a county in which he is not commissioned to act; consequently, all notices of such sale must be utterly nugatory. Nor can he seize and sell property with any greater legal propriety as a whole when a part of that property was in a county to which his authority therein did not extend.

When Jesse Drew, the deputy sheriff, who undertook to make sale of the right in equity to redeem the premises mortgaged by the Buckfield Branch Railroad Company to the defendant, posted the notices of sale, etc., we are not aware of any power in him to expose by sale any right existing beyond the limits of his precinct. If he had no right to sell, he certainly had none to seize, and the notices were then a nullity.

But the plaintiff relies upon the statute of January 28, 1851, which went into operation on that day, ten days only before the sale. It is not perceived that the notices and advertisements would not have been conformable to law if this statute had been in force at the time of the seizure, and the causing of the notices to be given and the advertisements to be published. Nor do we see any defects in the sale upon this hypothesis, if the property treated as real estate was legally of that character.

This statute provides that when the mortgaged lands are situated in two or more counties, the sheriff, or a deputy sheriff, of either of the counties may sell the whole right of redemption; and if it appears that he gave the notices "as above described," the sale shall be in all respects as effectual as if the land had been wholly in a town situated in his own county." This provision, by its terms, is an addition to section 37, chapter 94, of the revised statutes of 1841. The object of this enactment seems to have been merely to allow the entire right which may exist in two counties to be sold by a sheriff or his deputy in one of the counties, provided the notices shall be such as were previously required when the land lay in one county exclusively.

This statute is general, and designed to give a power to a sheriff or his deputy, after its passage, which did not exist be-

fore. It does not, in the slightest degree, dispense with any act previously necessary to make valid a sale of an equity of redemption in real estate. The former requirement, that notices should be given thirty days at least before the sale, remained unimpaired. The notices, "as above prescribed," must refer, not only to notices which the statute, existing when they were made, provided to be given upon a seizure of an equity of redemption, legally made, but also to those which, under the same laws, would be required as parts of the proceedings, which would constitute a valid transfer of the interest attempted to be sold. It could not refer to notices upon a seizure, which the officer had no power to make, and which, if made, would be without legal effect.

A paper, exposed in a public place, purporting to be a notice that a sale would be made, which the law at the time did not authorize, was no notice whatever. And so long as a notice, to be legal, is required to be given thirty days at least previous to the time of sale, one which is ineffectual till ten days only before the sale cannot be sufficient. The steps essential to render the sale of the equity of redemption effectual not having all been taken, the purchaser thereof acquired no interest, and consequently could confer none upon others.

The preceding views are based upon the assumption that the defendant had the rights which the plaintiff supposes, before the attempted transfer thereof, and that the statutes provided a mode by which those rights could be transferred under an officer's sale. Whether such rights existed, and were the subject of sale upon execution, are questions upon which we give no opinion.

Bill dismissed, with costs.

HATHAWAY, CUTTING, and GOODENOW, JJ., concurred.

RICE, J., concurred in the result.

STATUTORY AUTHORITY, BY WHICH ESTATE OF ONE MAN IS TRANSFERRED to another, must be strictly pursued: *Reynolds v. Wilson*, 60 Am. Dec. 753, note 755; *Lowry v. Erwin*, 39 Id. 556, note 573; *Bloom v. Burdick*, 37 Id. 299, note 309, where other cases are collected. In disposing of a debtor's lands by compulsory proceedings under the statute, for the payment of his debts, the course prescribed must be strictly followed: *Smith v. Dow*, 51 Me. 28; *Russell v. Dyer*, 40 N. H. 184; *Russell v. Dyer*, 43 Id. 400, all citing the principal case. And the omission to give notice is fatal to the validity of a sale on execution: *Curd v. Lackland*, 49 Mo. 454, citing the principal case.

SALE BY SHERIFF OF ONE COUNTY, under execution directed to the sheriff of another, of land lying in the former county, is unauthorized and confers no title: *Bybee v. Ashby*, 43 Am. Dec. 47, note 52.

DEFECT IN NOTICE OF EXECUTION SALE, EFFECT OF: See *Draper v. Bryson*, 57 Am. Dec. 257, note 265; *Brooks v. Rooney*, 56 Id. 430, note 436; *McMichael v. McDermott*, 55 Id. 560; *Richard v. Meeks*, 54 Id. 49, note 50; *Howard v. North*, 51 Id. 769, note 787, where prior cases are collected.

LORD v. CHADBOURNE.

[42 MAINE, 429.]

LAW WILL NOT ENFORCE CLAIMS MADE IN CONTRAVENTION OF ITS MANDATES, nor protect property which is held and is being used in deliberate violation of its enactments.

MAINE ACT OF 1851, C. 211, SEC. 16, DENIES RIGHT TO MAINTAIN ANY ACTION of which spirituous liquors may be regarded in any manner as the subject-matter.

LEGISLATURE MAY PASS LAWS ALTERING, OR EVEN TAKING AWAY, REMEDIES for the recovery of debts, or for the recovery of compensation in damages for torts, without incurring a violation of the provisions of the constitution which forbid the passage of *ex post facto* laws.

NO ACTION CAN BE MAINTAINED FOR VALUE OF LIQUORS held in violation of, and for the purpose of violating, the Maine act of 1851.

JUDGMENT IS CONCLUSIVE ON PARTIES ONLY AS TO WHAT WAS DIRECTLY IN ISSUE in the case in which it was rendered. And in order to render a former judgment a complete bar, it must appear to have been a decision upon the merits; if the suit is discontinued, or the plaintiff becomes non-suit, or there is no judgment upon the matter in issue, the proceedings are not conclusive.

JUDGMENT IN REM BY COURT OF SPECIAL AND EXCLUSIVE JURISDICTION is an adjudication upon the *status* of some particular subject-matter, and is conclusive upon all persons.

IN PROCEEDING UPON SEIZURE OF LIQUORS, JUDGMENT OF DISMISSAL, and for return of the liquors seized, is not an adjudication upon the *status* of the liquors; and in an action to recover the value of the liquors subsequently brought by their owner against the officer who seized them, evidence that at the time of the seizure the plaintiff kept them for sale, he not having a license to sell, and that he had been in the habit of selling them in violation of law, is admissible on the part of the defendant for the purpose of showing the *status* of the liquors, and of determining their value with reference to the question of damages.

TRESPASS on the case. The plaintiff introduced in evidence a warrant issued by the judge of the municipal court of Saco, on the complaint of certain persons, for a search of the shop occupied by Lord, with the return thereon of the deputy sheriff; and also a copy of a judgment of the supreme judicial court in the case of *State v. Spirituous Liquors and Rufus M. Lord*, and a writ of restitution issued upon said judgment, with the return thereon of the coroner. The plaintiff then introduced evidence

that the defendant Chadbourne had directed the deputy sheriff in the seizure, and in all his proceedings, and to sign the return; and that Chadbourne had said that he would take control of the property, and would be responsible for it, and return it, if so ordered, or pay for it. He also introduced evidence as to the value of the liquors. The defendant then offered the evidence referred to in the opinion, which the court excluded. The cause was thereupon submitted to the jury for the purpose of settling the amount of the damages, and a verdict was rendered for the plaintiff. The parties then agreed to report the case for the determination of the whole court.

John H. Goodenow, and Shepley and Hayes, for the plaintiff.

Eastman and Leland, for the defendant.

By Court, APPLETON, J. It is well settled that the common law will afford no aid to a party whose claims can be successfully enforced only by a violation of its principles, or in direct contravention of a statutory enactment. It has accordingly been held that no action could be maintained upon a bond or contract executed upon the sabbath: *Pattee v. Greely*, 13 Met. 284; *Lyon v. Strong*, 6 Vt. 219. So the price of spirituous liquors, sold contrary to law, cannot be recovered: *Dixie v. Abbott*, 7 Cush. 610; *Ladd v. Dillingham*, 34 Me. 316. Nor is an action maintainable upon a note given for goods bought to be carried about and peddled contrary to law: *Robinson v. Howard*, 7 Cush. 611. Trade with the enemy in time of war is illegal, and one who knowingly aids another in such trade cannot recover compensation therefor: *Beach v. Kezar*, 1 N. H. 184.

The same principle has been regarded as applicable to actions sounding in tort. No action on the case for deceit in the exchange of horses, made on the sabbath, can be maintained: *Robeson v. French*, 12 Met. 24 [45 Am. Dec. 236]. So a person traveling on the Lord's day, neither from necessity or charity, is not entitled to recover against a town for an injury received by him while so traveling, in consequence of a defective highway, which the town was by law obliged to keep in repair: *Bosworth v. Swansey*, 10 Id. 363 [43 Am. Dec. 441]. If the owner of a horse knowingly lets him on the Lord's day to be driven to a particular place, but not from any purpose of necessity or charity, and the hirer injures the horse by immoderate driving, an action cannot be maintained against him for such injury, although it is occasioned in going to a different place and beyond the limits specified in the contract: *Gregg v. Wyman*, 4 Cush.

322. "Courts of justice," remarks Redfield, J., in *Spalding v. Preston*, 21 Vt. 9 [50 Am. Dec. 68], "will not sustain actions in regard to contracts or property, which has for its object the violation of law. If a gang of counterfeiters had quarreled about the division of their stock or tools, a court of justice could hardly be expected to sit as a divider between them. If one had taken the whole in violation of the laws by which such associations subsist, a court of law could not interfere, because it is not presumed to be expert in such questions. And if it were, it is considered to be a scandal that such matters should be discussed or adjusted. Such property is, so to speak, outlawed, and is common plunder. One who sets himself deliberately at work to contravene the fundamental laws of civil government—that is, the security of life, liberty, or property—forfeits his own right to protection in those respects wherein he was studying to infringe the rights of others. . . . So, too, if a member of the body politic, instead of putting his property to honest uses, converts it into an engine to injure the life, liberty, health, morals, peace, or property of others, he thereby forfeits all right to the protection of his *bona fide* interest in such property before it was put to such use."

The general principle involved in the cases cited, and the almost innumerable decisions made in entire accordance therewith, is, that the law distinguishes between rights acquired in conformity with and arising under its provisions, and claims originating in their clear and palpable violation; that it will not enforce claims made in contravention of its mandates, nor protect property held against and being used for the deliberate purpose of disobeying its enactments. A different course would be suicidal. The law cannot lend its aid to the destruction of its own authority and to the disobedience of its own commands.

The defendant, on the trial at *nisi prius*, offered to prove, at the time of the seizure of the liquors in dispute by Kimball under the warrant referred to in the report of the case, and for a considerable time previous, that they were kept for sale by the plaintiff, he not being licensed to sell, etc., and that he had been in the habit of selling said liquors in violation of law; but the presiding judge ruled that this testimony was inadmissible, and excluded the same.

However the common law may be on this subject, the statute of 1851, c. 211, sec. 16, in clear and distinct terms denies the general right to maintain any action of which spirituous liquors may in any mode be regarded as the subject-matter. It provides

that "no action of any kind shall be maintained in any court in this state, either in whole or in part, for intoxicating or spirituous liquors sold in any other state or country whatever; nor shall any action of any kind be had or maintained in any court in the state for the recovery or possession of intoxicating or spirituous liquors, or the value thereof." The legislature may pass laws altering or modifying or even taking away remedies for the recovery of debts, without incurring a violation of the provisions of the constitution, which forbid the passage of *ex post facto* laws: *Evans v. Montgomery*, 4 Watts & S. 218.

"If the legislature," says Rogers, J., in *Commonwealth v. McCloskey*, 2 Rawle, 369, "should pass a law in plain, unquestioned, and explicit terms, within the general scope of their constitutional power, I know of no authority in this court to pronounce such an act void, merely because, in the opinion of the judicial tribunal, it was contrary to the principles of natural justice." The right to take away the remedy for the recovery of debts, and for the recovery of compensation in damages for *torts*, rests upon similar grounds. For a long time usury was a valid defense to a loan of money made against the provisions of the statute on this subject. So the right to recover has been denied, because regulations as to the survey or the inspection of articles sold have been disregarded, though in all such cases the articles sold were none the less valuable, and the seller was none the less, in equity, entitled to compensation for the thing sold. Much more, then, may the aid of the law be denied when the plaintiff seeks compensation for what was held in defiance of its mandates, and with the intent to disregard its clearest prohibitions.

The language of the statute is most general. But in *Preston v. Drew*, 33 Me. 562 [54 Am. Dec. 39], it was held, and on the most satisfactory reasoning, and after a comparison of one part of the statute with another, that this generality of language should be limited and restrained to liquors held in violation of law, and which were liable to forfeiture. "The general intent and declared purpose of the act," remarks Shepley, C. J., "would in no degree be infringed by regarding the general language to be so limited as to forbid the maintenance of any action for the recovery or possession of such liquors, or their value, which were liable to seizure and forfeiture, or intended for sale in violation of the provisions of the act." The correctness of the construction there given cannot be a matter of question. Were it not so, the protection of the law would be with-

held from liquors held in accordance with its express provisions; the town could not enforce their rights to liquors taken from the possession of their agent, nor could the mechanic recover damages for the destruction of liquors purchased for mechanical purposes.

The language of the act prohibits the maintenance "of any action of any kind." It includes all modes of vindicating the possession, if withheld, or of enforcing compensation in damages, if destroyed, subject to the limitation just considered. It equally embraces replevin, trespass, or trover, as *assumpsit*.

It is not necessary to examine the constitutionality of the search and seizure clause, for if trover or trespass cannot be maintained for the conversion or destruction of property held in violation of law against the person thus converting or destroying, it is immaterial whether he be an officer or not, or how, or in what way, or for what purposes, such conversion or destruction took place. If the defendant were acting under a warrant ever so illegal or unconstitutional, that would not place him in any worse condition than if acting without any process whatever; that would not enlarge the rights of a plaintiff who was holding his property in palpable disregard of law, or enable him to recover in avowed disobedience to the provisions of the statute. This was the conclusion to which the court, upon mature consideration, arrived in *Black v. McGilvery*, 38 Me. 287; *Nichols v. Valentine*, 36 Id. 322.

Upon the express words of the statute, as well as upon adjudged cases, no action can be maintained for the conversion or for the value of liquors held in and for the purposes of the violation of law, and consequently liable to forfeiture and destruction.

Has there been, then, any judicial decision by which the defendant is precluded from setting up, in reduction of damages, facts which otherwise would be open to him, and which without such judicial decision would have been available?

"The judgment of a court of concurrent jurisdiction," says Gibson, C. J., in *Hibshman v. Dulleban*, 4 Watts, 191, "directly upon the point, is as a plea, a bar, or as evidence, conclusive between the same parties on the same matter, directly in question, in another court. . . . But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment." Judgments are held conclusive upon the parties only as to that which is directly in issue. "It

is only when the point in issue has been determined that the judgment is a bar:" Greenl. Ev., sec. 529. "So, also, in order to constitute the former judgment a complete bar, it must appear to have been a decision upon the merits," etc.: Greenl. Ev., sec. 530. If the suit is discontinued, or the plaintiff becomes nonsuit, or there is no judgment upon the matter in issue, the proceedings are not conclusive. •

When the proceedings are *in rem*, the decree of a court of peculiar and exclusive jurisdiction, whether of condemnation or acquittal, is binding upon all parties: *Gelston v. Hoyt*, 13 Johns. 561. A judgment *in rem* is an adjudication upon the *status* of some particular subject-matter, by a tribunal having competent authority for that purpose. Such adjudication concludes all persons from saying the thing adjudicated upon was not such as is declared by such adjudication: 2 Smith's Lead. Cas. 430.

In the case at bar the judgment was, "that the complaint be hence dismissed, and that the said Rufus M. Lord have a return of his liquors so as aforesaid seized, returned upon said warrant. and in the keeping of said Kimball," etc.

Whether the officer would or would not be in contempt for disobedience of the order of court is not a question presented for consideration.

It is apparent from the record that there has been no trial of the guilt or innocence of Lord, nor any adjudication as to the *status* of the liquors seized. If the proceedings be regarded as *in rem*, there has been no judgment of condemnation or acquittal.

If, as may be regarded as probable, the complaint was dismissed for want of form, or if, indeed, for want of jurisdiction, there remained no mode by which the *status* of the liquors could be judicially determined. They were equally liable to seizure again upon a new complaint as is a respondent who may have been discharged upon a *vol. pros.* The *status* of the liquors was neither tried nor determined. Nor does it appear by the judgment that they have been acquitted. It seems rather to resemble a *vol. pros.*, or nonsuit, in which the judgment is not conclusive.

But even if these proceedings were to be regarded as conclusive upon the general question of the right of the plaintiff to restitution, yet as the *status* of the liquors has never been judicially settled, they can in no event be binding as to the value of the liquors in dispute. That question still remains open to the parties. If they were held by the plaintiff to be used in open violation of law, that fact was most material in reference to the

question of value. As the question whether these liquors were held in violation of law has never been determined, and as their *status* is a matter essential in determining their value, it must be regarded as still open to the defendant to show these facts; otherwise, his rights will be concluded by a judgment to which he was not a party, and in which the *status* of the liquors neither was nor could be considered.

It was held in *Moullon v. Smith*, 32 Me. 406, that in replevin a verdict of *non cepit*, and a judgment for a return, are not conclusive upon the question of property. They only show that for some cause the defendant was not entitled to possession. Still less would it bind a party as to the question of value. In the present case, the order for a return gives no indication of the *status* of the goods, nor of their value. There is no judgment which would be a bar to a new complaint; and if so, there has been no fact determined inconsistent with the evidence offered and rejected. The complaint may have been properly dismissed and yet the liquors may have been kept for sale in violation of law. If they were so kept, that fact is material in determining the damages to which the plaintiff would be entitled. Whether they were so kept was an issuable fact, which has never been judicially determined, and which is important in the assessment of damages. The evidence offered and rejected should have been received.

Exceptions sustained.

TENNEY, C. J., and RICE, J., concurred.

GOODENOW, J., having been of counsel, did not sit.

POWER OF LEGISLATURE TO REGULATE SALE OF SPIRITUOUS LIQUORS: See *Santo v. State*, 63 Am. Dec. 487, note 519, where other cases are collected. The legislature can confer police powers upon public officers for the protection of the public health: *Haverty v. Bass*, 66 Me. 73, citing the principal case. A suit brought for the value of liquors kept in violation of the statute of the state is not maintainable: *Brightman v. Bristol*, 65 Id. 435, citing the principal case.

EX POST FACTO LAWS, WHAT ARE: See *Boston v. Cummins*, 60 Am. Dec. 717, note 726, where other cases are collected.

FORMER JUDGMENT, WHEN BAR TO SUBSEQUENT ACTION: See *Emery v. Fowler*, 63 Am. Dec. 627, note 631; *Norton v. Doherty*, Id. 758, note 760, where other cases are collected. To ascertain whether or not a former judgment is a bar to present litigation, the true criterion is found in the answer to the question, Was the same vital point directly in issue, and determined? *Howard v. Kimball*, 65 Me. 330, citing the principal case.

JUDGMENT, HOW FAR CONCLUSIVE: See *Lee v. Kingsbury*, 62 Am. Dec. 546, note 550, where other cases are collected. A former judgment is only conclusive of such facts as were directly in issue: *Greenup v. Crooks*, 50 Ind. 421, citing the principal case.

MOORE v. FALL.

[42 MAINE, 450.]

UPON PROOF THAT NOTE HAS BEEN DESTROYED, RECOVERY MAY BE HAD THEREON AT LAW.

OWNER OF LOST NOTE MAY MAINTAIN ACTION THEREON AT LAW, without furnishing an indemnity, if it appears that the statute of limitations may be interposed to prevent a recovery by a *bona fide* holder.

COURT CANNOT DISMISS ACTION ON LOST OR DESTROYED NOTE, properly commenced and legally pending, unless the plaintiff tender a bond of indemnity. If the evidence be insufficient to prove its destruction or loss, the defendant is entitled to a verdict in his favor, but not to a dismissal of the action.

ACTION on a note. The facts are stated in the opinion.

N. Clifford and L. S. Moore, for the plaintiff.

Eastman and Leland, for the defendant.

By Court, APPLETON, J. This is an action brought by the indorsee upon an indorsed note, which there was proof tending to show had been destroyed by fire since the commencement of the suit.

After the evidence for the plaintiff had been introduced, the counsel for the defendant moved a nonsuit, on the ground that an action at law could not be sustained on proof either of the loss or destruction of the note, which motion was overruled.

The law is well settled that a recovery may be had on a lost note which is not negotiable, or which, being negotiable, has not been negotiated, or which, being negotiated, has been specially indorsed to a particular individual, to whom it is exclusively payable: *Pintard v. Tackington*, 10 Johns. 104; Ch. Bills, 10th Am. ed., 264.

In England, if a note, being negotiable and negotiated, has been lost, the court of equity has jurisdiction to enforce payment of the amount due, upon a sufficient indemnity. In Massachusetts a court of law prescribes a reasonable security for the defendant's protection, upon furnishing which the plaintiff is permitted to recover. It seems, too, that the courts of that state will continue the action till the lost note shall have become barred by the statute of limitations.

If the note was destroyed, it is well settled that the plaintiff, upon proof thereof, may recover at law: *Rowley v. Ball*, 3 Cow. 803 [15 Am. Dec. 266]; *Swift v. Stevens*, 8 Conn. 431; *Viles v. Moulton*, 11 Vt. 470.

No question was made as to the sufficiency of the proof to show the loss or destruction of the note in suit.

The motion for a nonsuit, on the ground that no action could be sustained at law, on proof that the note was destroyed, was properly overruled.

In this state it was determined in *Torrey v. Foss*, 40 Me. 74, that the owner of a lost note may maintain an action at law, without furnishing an indemnity, if it appear that the statute of limitations may be interposed to prevent a recovery by a *bona fide* holder. The defendant would be now protected by time against a future holder of the note, had it been lost.

The motion to dismiss the action, unless the plaintiff tendered a bond of indemnity, was properly denied. The court had no authority, for any such cause, to dismiss an action properly commenced and legally pending. If the evidence was insufficient to show the existence and destruction of the note in suit, or its loss, the defendant may have been entitled to a verdict in his favor, but not to the dismissal of the action.

Exceptions overruled.

TENNEY, C. J., and RICE and GOODENOW, JJ., concurred.

ACTION ON LOST NOTE: See *Thayer v. King*, 45 Am. Dec. 571, note 574, where other cases are collected.

INDEMNITY, WHEN REQUIRED IN ACTION OR SUIT ON LOST NOTE: See *Welton v. Adams*, 60 Am. Dec. 579, note 581, where other cases are collected.

TREAT v. LORD.

[42 MAINE, 552.]

PUBLIC EASEMENT IN STREAM, FOR PASSAGE OF LOGS, MAY BE CONTROLLED, abridged, or even destroyed, by the state by virtue of its sovereignty or right of eminent domain, disconnected from and not dependent upon its ownership of the soil; but until such power has been exercised by positive legislation, all persons may lawfully enjoy such easement in common with the state.

RIGHTS WHICH ARE PART OF STATE SOVEREIGNTY, CONFERRED FOR PUBLIC GOOD, cannot be lost by disseisin.

CONVEYANCE BY STATE OF ALL ITS RIGHT, TITLE, AND INTEREST in and to the land over which a stream passes does not convey to the grantee any exclusive right of property in the easement for the passage of logs upon the stream, and does not authorize him, nor those claiming under him, to use exclusively, or to destroy, the public easement existing upon the stream at the date of its execution.

STATUTES RELATING TO RIGHT OF ERECTING MILLS AND DAMS do not excuse or justify the erection of a dam in such a manner as to interrupt or

destroy the public easement or right of way in the stream upon which it is built.

PUBLIC EASEMENT EXISTS IN STREAM which is inherently and in its nature capable of being used for the purposes of commerce, for the floating of vessels, boats, rafts, or logs, leaving to the owner of the soil all other modes of use not inconsistent with the easement.

NO ACCIDENTAL OR INTENTIONAL OBSTRUCTIONS IN STREAM, which were not there in its natural state, will take from it its inherent and natural capability of being used as a passage-way for the purposes of commerce.

PUBLIC MAY USE STREAM FOR FLOATING LOGS, notwithstanding it may sometimes be necessary to go upon its banks to effect such floating; such incidental necessity neither enlarges nor diminishes the natural capacity of the stream, nor in any way affects its public character.

STREAM SO SMALL AND SHOAL THAT NO LOGS CAN BE DRIVEN IN IT, without being propelled by persons traveling on its banks, is private property, and not subject to any public servitude for the passage of logs.

COURT IS NOT BOUND TO GIVE REQUESTED INSTRUCTION IN PRECISE WORDS of the request. It is sufficient if it be substantially given in any form, so that the jury may not misunderstand the law of the case.

REQUEST TO STATE LEGAL PROPOSITION HAVING NO CONNECTION WITH PROOF in the case, however correct it may be, may be properly refused by the court.

TRESPASS quare clausum fregit. Plea, the general issue, with a brief statement. The facts are sufficiently stated in the opinion.

Rowe and Bartlett, for the plaintiffs.

John A. Peters, for the defendants.

By Court, MAY, J. This is an action of trespass *quare clausum*, for breaking and entering the plaintiffs' close, consisting "of mills and four dams, with the mill-ponds and mill-yards and sites appurtenant to said dams and mills," situate upon Cold stream, at Enfield, in the county of Penobscot; and for hoisting his gates and tearing away his said dams. The defendants justify the acts complained of, so far as proved, because, as they say, the said Cold stream is a public, navigable stream, upon and over which the public have a right of passage for driving logs, and the said acts were necessarily committed for the enjoyment of such right.

The case comes before us upon exceptions taken to the rulings of the judge who presided at the trial; and the first instruction relates to the legal effect of the deed from the commonwealth of Massachusetts to Joseph Treat, under which the plaintiffs claim, and which was executed in pursuance of a resolve of the legislature of that state, passed February 7, 1820. In relation to this, the jury were instructed "that if Cold stream was such a

stream as the public would have an easement in for the driving of logs, on account of its inherent capacity for being so used, then said resolve, the proceedings under it, the bond of Treat, and the conveyance to him, would have only the effect of a deed from the proprietor of the soil, which would convey the land only, subject to the public easement; that the right of way was in the waters, and the plaintiffs would have no authority to prevent its exercise; that he could, by law, erect and continue his dams and mills, but was bound to provide a way of passage for the plaintiffs' logs." It is contended that by virtue of the proceedings under said resolve; inasmuch as the said Joseph Treat was bound by his bond to erect and put in operation a good and sufficient saw-mill and grist-mill on said Cold stream within two years from the passing of said resolve, which must necessarily include the right to erect and maintain a dam or dams across the same, it must have been the intention of the legislature to have granted him full power and authority so to do. Said resolve authorizes the commissioners of the land-office of that state to convey, and their deed does convey, to said Treat, his heirs and assigns, all the right, title, and interest of said commonwealth in and to a certain tract of land of the contents of five thousand acres, describing it by metes and bounds, which include the *locus in quo*. This instruction is based upon the fact that the public had an easement in said stream for the passage of logs at the time of said conveyance—an easement which conferred upon all persons having occasion so to use it the right to do so without any license or grant from said commonwealth. It is true, the right to control, abridge, or even destroy such easement then existed in said commonwealth by virtue of its sovereignty or right of eminent domain, disconnected from and not dependent upon its ownership of the soil; but until so exercised by positive legislation, all persons might lawfully enjoy such easement in common with said commonwealth.

It is otherwise in regard to the public lands. If any person enter upon them without license, he is a trespasser, and the commonwealth may be disseised of such lands; but after the disseisor has acquired a title by lapse of time, his title will not be disturbed by any release or grant to other persons from the commonwealth, whilst such rights as are a part of the state sovereignty conferred for the public good cannot be lost by desseisin. The right of property is one thing, and the right to regulate or control the use of property *pro bono publico*, by appropriate legislation, is quite another thing. The first is property subject to

be conveyed by deed or other legal mode of disposition; but the last is a part of the sovereign power itself. We are of opinion, therefore, that the resolve of the legislature of Massachusetts, and the proceedings under it, including the bond and deed aforesaid, cannot fairly be construed as conveying anything but the right of property to which they refer; that the said commonwealth, at the time of said conveyance to Joseph Treat, had no such exclusive right of property in the easement for the passage of logs upon Cold stream (if such easement existed), as would pass by a grant of all its right, title, and interest in and to the land over which said stream passes; and that by the deed to said Treat, conveying no rights to him other than the rights of property, which the grantors then had, he was not authorized by virtue thereof, nor are those claiming under him, to use exclusively or to destroy the public easement then existing upon said stream.

It is now further contended that the plaintiffs had a right to erect and maintain their dams by virtue of the statute for the encouragement of mills: R. S., c. 126, sec. 1. This point does not appear to have been raised at the trial. The judge neither made nor was requested to make any ruling relating to it. It is not perceived, however, how the proposition contended for can be sustained. The statutes in relation to the right of erecting mills and mill-dams, and flowing lands, has never been "so construed as to justify or excuse the erection of a dam in such a manner as to overflow a public highway already appropriated and in actual use, and thereby render it impassable." The contrary has been directly held: *Commonwealth v. Stevens*, 10 Pick. 247.

The reasons for such decision seem to apply with equal force to a public right of way or easement in a river, and where there is the same reason there should be the same law. In the case before the court, it does not appear that the erection of mills and dams upon said stream would necessarily interfere with the rights of the public in driving logs thereon, especially if suitable provisions were made therefor; if so, the rights of the mill-owner and the public could both be enjoyed without any conflict between them. No error is perceived in the instructions of the court relating to the plaintiffs' right to maintain their dam.

2. The great question of fact in the case was whether said stream was subject to such public servitude or not; and the jury were instructed that in determining this question "the true test to

be applied in such cases is whether or not a stream is inherently and in its nature capable of being used for the purposes of commerce, for the floating of vessels, boats, rafts, or logs; and when a stream possesses such a character, then the easement exists, leaving to the owners all other modes of use not inconsistent with it." This is found to be in exact accordance with the law as laid down by the court in the case of *Brown v. Chadbourne*, 81 Me. 9 [50 Am. Dec. 641]. Considering the importance of this rule of law to the lumbering commerce of our state, and the fact that it has been so recently fully considered and determined by this court, after elaborate argument from able counsel on both sides, we do not feel that the ingenious reasons now offered in the argument for the plaintiffs are sufficient to require us to overrule it. We think it is clear also, and in conformity with the case just cited, that no accidental or intentional obstructions in the stream, which were not there in its natural state, would legally take from it its inherent and natural capability of being used as a passage-way for the purposes of commerce. The whole question of inherent capacity was properly left to the jury. They were permitted to look at the whole evidence in the case; at the width and depth of the stream; at the quantity of water flowing in it at the different seasons of the year; and at all the obstructions or obstacles in the way of its use as a passage-way for logs or other property, whether there originally or by accident, or otherwise; and from all these, with the other evidence in the case, they were left free to determine the inherent and natural capacity and character of the stream, so far as regarded its facilities for floating logs to places for manufacture or sale, and thus aiding in the demands of commerce. They were to determine what obstacles existed, and their effect; as, for example, whether a rock, if any such existed, being the only obstruction in the stream, and so situated that it might be easily removed, would take away from the stream its inherent capability. They were not instructed that a rock originally in the stream, such as would render the stream in its natural state incapable of floating logs, even though it might be easily removed, would not deprive the public of all right to use the stream as a passage-way; but the existence and effect of such a rock, as well as of all others, was left wholly to the jury, and no request for any instruction as to the legal effect of such a rock upon the natural capacity of the stream was made. If any instruction was desired upon this point it should have been asked. The example given by the presiding judge to the jury left them with

precisely the same right to determine the true capacity of the stream as if no such example had been given. There is nothing in the instructions upon this point as to the capacity of the stream which is not in accordance with the law.

3. The instruction "that in such a stream the right of the public exists, notwithstanding it may be necessary for persons floating logs thereon to use its banks," is directly settled in the case of *Brown v. Chadbourne*, 31 Me. 9 [50 Am. Dec. 641], and the reasons there stated for the existence of such right, notwithstanding such necessity, are satisfactory to us. But the judge was requested to instruct the jury "that if the stream was incapable of being used without traveling on its banks to propel the logs, there could be no public servitude in it," which instruction was refused. The legal proposition contained in the request is undoubtedly a sound one. The stream, in order to have the character of a public highway, must, in and of itself, have a capacity for floating logs. Such a stream, as well as our larger rivers, will, as experience has universally shown, from its windings and the rush of its waters, especially in times of freshets, cast many of the logs which float upon its bosom upon its shores, intervalles, and banks, thereby rendering it necessary to go upon such uplands for the purpose of making a clean drive. Such incidental necessity neither enlarges nor diminishes the natural capacity of the stream, nor in any way affects its public character. To meet such necessity, it is provided by the revised statutes, c. 67, secs. 10 and 11, that all logs or other timber, lodged upon any lands adjoining any of the waters within this state, shall, in certain contingencies and upon certain conditions, be forfeited to the owner or occupier of such lands; and that the owner of such timber may at any time before such forfeiture enter on said lands and remove the same by tendering a reasonable compensation for all damages as the statute requires. While, therefore, it is true that persons driving logs may go upon the banks of our public streams and rivers as necessity may require, it is also true that a stream which is so small and shoal in its bed that no logs can be driven in it without being propelled by persons traveling on its banks is private property, and not subject to such public servitude as is claimed in this case.

By the common law, it is clear that the public have no right to go upon the banks of ancient navigable rivers for the purpose of towing; and it is said by the court in the case of *Brown v. Chadbourne*, before cited, that "where a river cannot be used

without towing, or going upon its banks to propel what is floating, such fact would evince its want of capacity for public use; and we think such fact is conclusive that no such public servitude exists. The right of the public so to use a stream or river for the purposes of commerce rests in the intrinsic capability of its waters for such use, and is in no way dependent upon the necessity of using its banks. The judge who tried this cause seems so to have understood the law; for he told the jury "if it was necessary to go upon the banks more or less for the purpose of driving logs, that fact would not take from the stream its public character," if it was in other respects capable of being so used; and besides, the test which he gave for determining its public character, being that of inherent and natural capacity, would seem to exclude the idea of having any inherent natural want of such capacity to be supplied by any extraneous aid from persons traveling on its banks. It is not the right of counsel to have requested instruction, in itself proper, given to the jury in the precise words of the request. It is sufficient if it be substantially given in any form, so that the jury may not misunderstand the law of the case.

It will be found, also, from an examination of the testimony, as reported in the bill of exceptions, that there was no particular evidence touching the question whether the public use of the stream, as a passage-way for logs, was dependent in the least degree upon any propelling power from the banks; and the judge was under no obligation, when requested to state any legal proposition, however correct it might be, which had no connection with the proof in the case. The jury, under the instructions given, must have found that the stream had a sufficient inherent natural capacity for the floating of logs; and if they found this, it was not necessary to determine, or that they should know, what would be the effect of an insufficiency of such capacity without a propelling force from the banks, especially in a case where there was no evidence that such force was necessary or had ever been applied. We think, therefore, that no cause exists for setting aside the verdict, because such requested instruction, in the form stated, was not given; and no error being found in any other ruling, the exceptions must be overruled, and there must be judgment on the verdict.

Exceptions overruled.

TENNEY, C. J., dissented.

APPLETON and GOODENOW, JJ., concurred.

HATHAWAY, J., concurred in the result.

EASEMENT IN FAVOR OF PUBLIC EXISTS IN STREAM, if it is in its nature capable of being used for the purposes of commerce, for the floating of vessels, boats, rafts, or logs, leaving to the owners of the beds all modes of use not inconsistent with such easement: *Moore v. Sanborne*, 59 Am. Dec. 209, note 220, where other cases are collected; *Brown v. Chadbourne*, 50 Id. 641, note 649.

GRANT BY STATE IS DEEMED SUBJECT TO RIGHT OF NAVIGATION: See *Susquehanna Canal Co v. Wright*, 42 Am. Dec. 312, note 314, where other cases are collected.

STATE MAY IMPEDE NAVIGATION AS BY DAMS, ETC.: See *Moor v. Veazie*, 52 Am. Dec. 655, note 669, where other cases are collected.

PUBLIC MAY USE STREAM FOR FLOATING LOGS, although it may at times be necessary to go upon its banks to effect such floating: *Brown v. Chadbourne*, 50 Am. Dec. 641.

REFUSAL TO REPEAT INSTRUCTIONS ALREADY GIVEN IS NO GROUND FOR REVERSAL: See *Taber v. Hutson*, 61 Am. Dec. 96, note 101, where other cases are collected.

IRRELEVANT INSTRUCTIONS NEED NOT BE GIVEN: See *Fariah v. Reigle*, 62 Am. Dec. 666, note 688, where other cases are collected; *Fitzhugh's Ex'r v. Fitzhugh*, Id. 653.

THE PRINCIPAL CASE IS CITED in *Pearson v. Rolfe*, 78 Me. 385, to the point that if a stream is not susceptible of valuable use to the public for floatable purposes, without erections for raising a head, it cannot legally be deemed a public stream, even though it might be easily converted into a floatable stream by artificial contrivances. It is also distinguished in *Herrigan v. Connecticut R. L. Co.*, 129 Mass. 586, and in *Thunder Bay Booming Co. v. Speechly*, 31 Mich. 342.

HILL v. LEADBETTER

[42 MASS. 572.]

ONE WHO, HAVING CONTRACTED TO CARRY GOODS TO CERTAIN PLACE, CONVERTS PART of them to his own use on the way, may, in an action against the owner of the goods, recover the whole of the freight stipulated to be paid, if the defendant does not claim any deduction for the goods not delivered.

ACTION on the case. On the facts, which are stated in the opinion, the court, at the trial, ruled that though there was a special contract to haul the goods and deliver them entire, yet the plaintiff was entitled to recover of the defendant the stipulated price for the hauling, after deducting therefrom whatever damage might have been suffered by the defendant from the non-delivery of the part of the goods which had been converted by the plaintiff, and that said damage was nothing in this case, because Leadbetter had brought his action against Hill for the part of the property converted, and did not claim to offset the damages for such non-delivery in this action. The court there-

fore found for the plaintiff for the amount due for the hauling at the stipulated price, and the defendant excepted.

S. F. Humphrey, for the plaintiff.

Brett, for the defendant.

By Court, APPLETON, J. The plaintiff has brought this action to recover pay for the freight of a load of goods received by him of the defendant at Bangor, and to be delivered at No. 6, Aroostook county. On his way to the place of delivery he converted a portion of the goods to his own use, for which the defendant brought against him an action of trover, on which a default has been entered.

It has been decided in England that if the consignee of goods receive any benefit by their carriage he cannot defend himself from the payment of freight on the ground that the goods have been damaged by the master, in carrying them, to an amount exceeding the freight. The remedy of the consignee is by cross-action: *Shields v. Davis*, 6 Taunt. 65.

"The inclination of judicial opinion in this country seems to be to allow the injury done by the negligence of the carrier to be set off as an answer, *pro tanto*, to his claim for compensation:" Sedgwick on Damages, 451. So where a portion of the property has not been delivered, the consignee in New York has been allowed to recoup the damages so sustained in an action against him for freight: *Hinsdale v. Weed*, 5 Denio, 172.

In *Kaskaskia Bridge Co. v. Shannon*, 1 Gilm. 15, it was held that in an action for freight the defendant may set off a loss of a portion of the goods agreed to be transported by the carelessness and negligence of the carrier. In *La Motte v. Angel*, 1 Hawaiian Rep. 136, the question is discussed with great ability by Lee, C. J., and after a full examination of the English and American authorities, he arrives at the conclusion that, in a suit to recover the freight of goods, the consignee may set off the loss and damage of the goods arising from the negligence or misfeasance of the carrier.

The party receiving the goods has been held in all cases responsible for the freight—the only discrepancy between the decisions being whether the damages from injury to or non-delivery of the goods are to be recovered by a separate action or by recoupment from the freight earned.

That question, however, does not arise here, for the defendant does not claim a deduction.

The freight having been earned upon the goods received, and

the defendant not claiming a deduction therefrom for the goods not delivered, the rulings of the presiding judge at *nisi prius* were correct.

Exceptions overruled.

TENNEY, C. J., and RICE, HATHAWAY, CUTTING, and GOODENOW, JJ., concurred.

FREIGHT, DEDUCTION IN FOR SHORT DELIVERY: See note to *Crawford v. Williams*, 60 Am. Dec. 152, where this subject is discussed.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

SPRING GARDEN MUTUAL INSURANCE COMPANY v.
EVANS, USE OF RILEY.

[9 MARYLAND, 1.]

INSTRUCTION THAT THERE IS NO EVIDENCE OF FACT SOUGHT TO BE PROVED is proper, where the evidence is so loose and inconclusive that the jury cannot make a legitimate and reasonable inference, and find such fact to be established, without indulging in conjecture and speculation.

SUFFICIENCY OF PRELIMINARY PROOF OF LOSS UNDER POLICY OF INSURANCE is not admitted, nor further proof waived, by the action of the president of the insurance company, on inquiry being made of him as to "what further preliminary proof of loss was required," in answering that "the policy will show that."

NON-PRODUCTION OF PAPERS AFTER NOTICE DULY SERVED will allow proof of their contents by the opposite party, but will have no other legal effect, nor authorize any inference against the party refusing to produce such papers.

PARTY HAVING AFFIRMATIVE OF ISSUE MUST PRODUCE BEST EVIDENCE IN HIS POSSESSION, and failure to produce it, but an attempt instead to sustain the issue by inferior evidence, will authorize the inference that he does not furnish the best evidence because it would tend to defeat, instead of sustaining, the issue on his part.

WAIVER IS QUESTION OF LAW, AND NOT OF FACT.

PRAYER THAT THERE IS NO EVIDENCE OF WAIVER concedes truth of opposing party's evidence, and all legitimate inferences which may be drawn from it.

ACTION on an insurance policy. The opinion states the case.

Charles H. Pitts, for the appellant.

Robert J. Brent and Charles F. Mayer, for the appellee.

By Court, ECCLESTON, J. Whether there was error in refusing to grant the second prayer of the defendant, contained in the second bill of exceptions, we propose first to consider; and in doing so, the plaintiff will be allowed the full benefit of all the testimony of his witnesses, Hammond and Lavender. For which purpose the correctness of the decisions below, in regard to the first and third bills of exceptions, will be conceded, without, however, deciding whether they were correct or not.

The prayer alluded to asks the court to instruct the jury "that there is no evidence in this cause that such preliminary proof of loss, as required by the ninth condition of policy, was furnished by said Evans before the institution of this suit, and that there is no evidence that such preliminary proof of loss was waived by defendant, and that the plaintiff is not entitled to recover in this suit."

The following is the language of the ninth condition of the policy: "Persons sustaining any loss or damage by fire shall forthwith give notice thereof in writing to the company, secretary, or agent. And as soon after as possible they shall deliver as particular an account of their loss and damage as the nature of the case will admit, signed with their own hand. And they shall accompany the same with their oath or affirmation, declaring the said account to be true and just; showing also whether any and what other insurances have been made on the same property; what was the whole value of the subject insured; in what general manner (as to trade, manufactory, merchandise, or otherwise) the building insured, or containing the subject insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such building, and when and how the fire originated, as far as they know or believe. They shall also produce a certificate under the hand and seal of a magistrate, or notary public, most contiguous to the place of the fire, and not concerned in the loss, stating that he has examined the circumstances attending the fire, loss, or damage alleged, and that he is acquainted with the character and circumstances of the insured claimants; and that he verily believes that he, she, or they have, by misfortune, and without fraud or evil practice, sustained loss and damage on the subject insured, to the amount which the magistrate or notary public shall certify. And until such proofs, declarations, and certificates are produced, the loss shall not be payable."

In reference to the preliminary proof thus required, the plaintiff examined G. W. Hammond, who says: "It was, I

think, on the twenty-second of March, 1849, two days after the fire, that I went to Baltimore. In compliance with the request of Mr. J. P. Riley, I called, on the twenty-third, the day after my arrival, at the office of Mr. Lovegrove, agent for this company, to present certain papers and to arrange the settlement of the loss. I was informed by a person who I took for the clerk of Mr. Lovegrove, that he, Mr. Lovegrove, was in the country, and would not be in until late in the evening. I left with the clerk, for Mr. Lovegrove's inspection, the papers sent by Mr. Riley, among which were a notice of the loss and a transfer of the policy to Mr. Riley. I accordingly called again on the following day and found Mr. Lovegrove in the office. I cannot now remember all that passed in conversation between Mr. Lovegrove and myself; but this I remember, that he declined taking any step in the matter, returned me the papers I had left for his inspection, and referred me to the office of the company in Philadelphia, giving as a reason for this that the company was about to close and discontinue the agency in Baltimore. I went to Philadelphia the following day, I think, and soon after my arrival I called at the office of this company, saw, I think, the president and secretary of the company, stated what had passed at the office of their agency in Baltimore, and presented the papers of Mr. Riley. I was informed by the president that their board would meet on a certain day, and then the matter would receive proper attention, but until then nothing could be done. As this day would not arrive until after my departure, I requested him to report the action of the board to Mr. Riley, which he said he would do."

If this testimony is the only evidence on which the plaintiff can properly rely to show a compliance with the ninth condition of the policy, the defendant certainly had a right to ask the court to instruct the jury there was no evidence that such preliminary proof as the policy required had been furnished; for the witness Hammond, in speaking of the papers which he took to the agent in Baltimore, and afterwards to the office of the company in Philadelphia, does not profess to give the contents, or to speak of the character of any of them, except that he says, "Among them were a notice of the loss and a transfer of the policy." Instead of making legitimate and reasonable inferences, a jury would be traveling in the fields of conjecture and wild speculation were they to find upon such proof as this that not only the notice of the loss but the other requirements of the ninth condition had been complied with.

But in aid of the testimony of this witness, the plaintiff relies upon that of Mr. Lavender. The conversation of the president of the company with this witness is supposed to be a tacit admission that there was no objection taken to any defect in the preliminary proof furnished to the company, through the agency of Hammond. Let us see with what propriety such a supposition is entertained. The witness had called to know why the loss had not been paid, stating at the time if there was any deficiency in the proof he would try to supply it. The person representing himself as president of the company said they had sent an agent to Winchester, and from his information they did not believe there could have been so much stock in a little room ten by twelve feet. The witness denied the correctness of the information given by the agent, and then inquired what further proof was wanted? The president replied, "The policy will show that;" or, "It is laid down in the policy." The witness asked for a blank policy, but none was furnished, the president stating they had several forms of policy, and he did not know which one was used in this case. Thus it will be seen that after speaking of the difference of opinion in regard to the size of the room and the quantity of goods it contained, Mr. Lavender wished to know what further proof was required, and he was answered by being told the policy will show that, or it is laid down in the policy. The inquiry was not whether any further proof was required, but what further proof. And the answer being as already stated, to such a question, so far from being a tacit admission, that there was no objection taken to any defect in the preliminary proof, it was in truth just the reverse, and amounted to an assertion that further preliminary proof was necessary; for if none was required, the policy could not possibly show what further proof was required; and if it could show that further preliminary proof was necessary, then the conversation was not a tacit admission of there being no objection to any deficiency in the proof.

The following notice to the defendant was served upon its attorney: "Take notice that on the trial of the above cause you are required and notified to produce the written notice of loss by fire, sent to you by the above plaintiff, and left with you in Philadelphia shortly after said fire, as also the account of the particulars of the plaintiff's loss by said fire, accompanied and verified by his affidavit, and the certificate of a magistrate or notary public, certifying his opinion of the amount of said loss by fire, and that the same was occasioned without fraud or evil

practice, which said last two papers were also delivered to your company, shortly after said fire, and before this suit." Because the defendant neither produced the papers mentioned in this notice or gave any excuse or reason for not producing them, the plaintiff insists that such conduct on the part of the defendant, in connection with the other proof in the cause, authorized the jury to presume that the papers contained the necessary preliminary proof. But the position here assumed is not sustained by the authorities. In such a case as this, the non-production of the papers has no other legal effect than to allow the opposite party to prove their contents. The refusal to produce does not authorize any inference against the party refusing: *Cooper v. Gibbons*, 3 Camp. 363; *Lawson and Another, Assignees of Shiffrer v. Sherwood*, 1 Stark. 314, in 2 Eng. Com. L. 405; 1 Greenl. Ev., secs. 37, 560; Evans' Pr. 293; Roscoe on Ev. 6.

The plaintiff's attorney, however, seems to consider his view of this question fully sustained by the case of *Clifton v. United States*, 4 How. 242. But the unfavorable inference there allowed against the party for not producing the papers was under very different circumstances from the present. There it was contended on the part of the United States that the goods in question had been forfeited by the claimant in consequence of his having fraudulently imported them. And the court below, under the seventy-first section of the act of 1799 (as the supreme court say they had a right to do), "had pronounced the proof sufficient to establish the offense, unless explained or rebutted by opposing evidence."

The counsel for the government, with a view of further strengthening their cause, and in pursuance of previous notice for that purpose, called upon the claimant for the production of his books and papers having relation to the importation of the goods. But neither the books nor papers were produced, nor any account given for the non-production. And on page 246 it is said: "Probable cause for the prosecution having been thus sufficiently established, the claimant went into his defense, and instead of furnishing evidence of the prices actually paid by him to the houses abroad from whom the goods were purchased, as he might have done, either by executing a commission to take their testimony, or by persons concerned in making the purchases, or by the production of the books of account that had been called for, as the call afforded him an opportunity to put them in evidence, he placed the defense altogether upon the judgment and opinions of merchants and other per-

sons acquainted with this description of goods, as to the value and cost of the article in the home market, tending thereby to confirm and support the correctness of the valuations as fixed in the invoices."

In the instructions given below it was stated "that the claimant knew from whom he had bought the goods, and what was their actual cost, and yet had not produced the testimony, or accounted for its absence; that to withhold testimony which it was in the power of the party to produce, in order to rebut a charge against him, where it is not supplied by other equivalent testimony, might be as fatal as positive testimony in support or confirmation of the charge. And that if the claimant had withheld testimony of his accounts and transactions with these parties (meaning the foreign houses from whom he had purchased the goods), the jury were at liberty to presume that, if produced, they would have operated unfavorably to his case."

It is evident that the supreme court affirmed these instructions because they were given at a stage of the case when probable cause for the prosecution had been established, and the *onus* of exonerating himself from the charge by proof was therefore cast on him. And a very serious charge it was, involving in its result not only the loss of considerable property, but loss of character also, being accused of violating the revenue laws of the country by means of frauds and perjuries.

On page 247 the court use this strong language: "Under these circumstances, the claimant was called upon by the strongest considerations, personal and legal, if innocent, to bring to the support of his defense the very best evidence that was in his possession or under his control. This evidence was certainly within his reach, and probably in his counting-room; namely, the proof of the actual cost of the goods at the place of exportation. He not only neglected to furnish it, and contented himself with the weaker evidence, but even refused to furnish it on the call of the government, leaving, therefore, the obvious presumption to be turned against him that the highest and best evidence going to the reality and truth of the transaction would not be favorable to the defense."

Now, in the case before us there was no obligation on the defendant to show any defect in the preliminary proof until the plaintiff had first made out a *prima facie* case of compliance with the requirements of the policy on that subject, which, we think, has not been done. The decision, therefore, in *Clifton v. United States*, 4 How. 242, cannot with propriety be applied to

the present question. In truth, that decision only recognizes the principle that when a party under an obligation to sustain his defense by proof has in his possession important evidence on the subject, and fails to produce it, but attempts to establish his defense by evidence of inferior character, it authorizes an inference that he does not furnish the best because it would injure, instead of benefiting, his cause. And we see no reason for doubting the correctness of the position already stated upon the authorities referred to, that the present failure to produce the papers under the notice only allowed the plaintiff the right to prove their contents.

After a careful consideration of all the circumstances, we are brought to the conclusion that the first proposition contained in the defendant's second prayer is right, and that the court ought to have instructed the jury there was no evidence in the cause that such preliminary proof as the ninth condition of the policy required had been furnished by the plaintiff before the institution of the suit.

The prayer also contains the proposition that there was no evidence that the preliminary proof of loss was waived by the defendant, which, in our opinion, is also correct.

The conversation between Mr. Lavender and the president is the proof which is relied upon to establish a waiver. But we suppose what has been said in reference to that conversation is sufficient to show that instead of considering it as any proof of an implied waiver it is a negation of any such implication.

The counsel of the plaintiff, however, says the court were right in refusing the prayer, because whether there was a waiver or not was a question for the jury, and not for the court.

In *Edwards v. Baltimore Fire Ins. Co.*, 3 Gill, 176, the plaintiff prayed the court to instruct the jury "that if they believed the facts set out in the foregoing statement, the defendants have waived the adduction by the plaintiff of the preliminary proofs required by the conditions annexed to said policy of insurance, and that such waiver dispenses the plaintiff from now offering evidence of his having furnished the same;" which prayer the court refused, and the decision was affirmed: *Id.* 185. Now, if the doctrine contended for by the counsel for the present plaintiff is correct, with reference to the circumstances of this case, it is reasonable to presume the late court of appeals would have placed their affirmance of the decision just referred to upon the ground that the prayer presented a question to the court which was exclusively for the consideration of the jury;

but they give not the least intimation of their entertaining such an opinion. On the contrary, the court enter into an argument to show that if the letter supposed to create the waiver could be so construed it could be of no avail to the plaintiff, because at the date of the letter it was too late to supply any defect in the preliminary proof. And then, on page 187, they decide the letter not to be a waiver, without intimating a doubt of their authority to treat the question as one of law.

Where all the facts and circumstances relating to the subject are admitted, in our opinion a party has the right to ask the court to inform the jury whether the evidence is sufficient to establish a waiver. Here there is no conflict of testimony, the proof being all on one side; and the prayer is such that it necessarily concedes the truth of all the plaintiff's evidence, and all legitimate inferences which may be drawn from it. That such is the necessary concession of the prayer may be seen by referring to *McElderry v. Flannagan*, 1 Har. & G. 320, where it is said: "Before the court could legally give the instruction prayed for by the appellee, they must admit the truth of the testimony offered by the appellants, and of the testimony given by the appellee, which may operate in the appellant's favor, and the existence of all material facts reasonably deducible therefrom, even though contradicted in every particular by the testimony on the part of the appellee." See also *Cole v. Hebb*, 7 Gill & J. 26; and *Guy v. Tams*, 6 Gill, 86.

In the absence of evidence to show that such preliminary proof as the policy made necessary had been furnished, and no waiver of that proof having been established, the plaintiff, of course, had no right of action, and therefore the second prayer should have been granted.

From the views already expressed, it is evidently proper, in our opinion, that the decision below should be reversed, because the defendant's fourth and sixth prayers were refused.

Having thus settled the important questions involved in this controversy, we suppose it unnecessary to express any opinion in regard to the other matters referred to in the argument.

Judgment reversed and *procedendo* ordered.

INSTRUCTION THAT THERE IS NO EVIDENCE OF FACT SOUGHT TO BE PROVED is not error, but is correct: See *Satterwhite v. Hicks*, 57 Am. Dec. 577.

NOTICE TO PRODUCE PAPERS, EFFECT TO LET IN SECONDARY PROOF: *Walden v. Davulson*, 25 Am. Dec. 602; *McKellip v. McIlhenny*, 28 Id. 711.

WHAT CONSTITUTES WAIVER IS QUESTION OF LAW: See *Minor v. Edwards*, 49 Am. Dec. 121.

GAITHER v. MYRICK.

[9 MARYLAND, 118.]

SUPERCARGOES ARE BOUND BY PRINCIPLES WHICH REGULATE CONDUCT OF FACTORS ABROAD, and are liable for injuries to the employer caused by want of reasonable skill or ordinary diligence.

TERM "REASONABLE SKILL" IMPORTS SUCH SKILL AS IS ORDINARILY POSSESSED and employed by persons of common capacity engaged in the same trade.

ORDINARY DILIGENCE MEANS THAT DEGREE OF CARE which persons of common prudence are accustomed to use in the conduct of their own business.

SUPERCARGOES MUST ACT IN GOOD FAITH AND EXERCISE proper judgment in their transactions in that capacity.

SUPERCARGO HAVING VENTURE OF HIS OWN IN SAME VESSEL must exercise as much diligence and care about his factorage transactions as he does about his own venture.

SUPERCARGO IS CHARGEABLE WITH NEGLIGENCE in making sale without proper inquiry, where he has had notice sufficient to put a person of prudence on his guard.

SUPERCARGOES CANNOT GENERALLY DELEGATE THEIR AUTHORITY, but the necessity of the case, the usages of trade, or the law and custom of the country where the agency is to be executed, may at times give rise to exceptions to this rule.

DUTIES AND LIABILITIES OF MASTER OF VESSEL, who is also consignee of the cargo, are as separate and distinct as to each capacity as if confided to different persons.

CARGO MUST BE CARRIED ACCORDING TO PROJECTED VOYAGE by use of every reasonable and practicable method, and the master and owners will be responsible for every act not strictly in furtherance of this duty.

NECESSITY TO JUSTIFY SALE OF CARGO AND SHIP BEFORE ARRIVING AT PORT OF DESTINATION must be such a necessity as supersedes all human laws, and a sale by the master without such necessity will render him and the owners liable to the shipper.

WHERE CONTINUANCE OF VOYAGE TO PORT OF DESTINATION IS IMPRACTICABLE, master should if possible transship goods to such port, but if this cannot be done, a return or safe deposit may be made, and if possible the shipper consulted; and in any case, the master should do that which would be most conducive to the interest of all concerned.

PROVISION IN CONTRACT OF AFFREIGHTMENT FOR TRANSPORTATION OF CARGO "to Valparaiso and a market," authorizes the ship to visit such other ports beyond the named port as may be deemed expedient by the master and supercargo, in the exercise of a sound discretion, and imposes on the ship the carriage of the goods until a market is found, or the goods left on deposit for sale, under circumstances of necessity authorizing a departure from the original contract; but such provision does not impose on the supercargo the duty of selling at the first or any other port, if he has reason to believe that he will find a better market by going farther, and acts in good faith.

SUBMISSION TO JURY OF QUESTIONS OF FACT for a finding, if there is no sufficient evidence of such facts, is erroneous.

AGENT IS PRESUMED TO HAVE DONE HIS DUTY until contrary appears; and misconduct and negligence will not be presumed in the absence of proof thereof.

MASTER WHO IS PART OWNER AND SUPERCARGO IS LIABLE FOR INJURY TO CARGO, resulting from sale of the vessel before the cargo is landed, and then landing it before a sale was effected or storage obtained, in order to deliver the vessel in compliance with the contract of sale.

RIGHT TO HAVE CARGO CARRIED AND DELIVERED ACCORDING TO PROJECTED VOYAGE is superior to power to sell vessel, and a claim for damages for a sale of the vessel before delivery of the cargo is not affected by the fact that the shipper knew that the vessel might possibly be sold.

ACT OF MASTER OF VESSEL IN SUBJECTING CARGO TO RISK OF BEING TAKEN AND CONDEMNED under the local laws of the port of discharge is not a ground for the recovery of damages against him, in the absence of proof that the cargo was so taken, or that any loss resulted therefrom.

CARGO LANDED BEFORE SALE AND BEFORE REACHING PORT OF DESTINATION will impose on master of vessel liability for charges of landing and reshipment to port of destination, and shipper will not be liable therefor.

MASTER OF VESSEL, WHO ALSO ACTS IN CAPACITY OF SUPERCARGO with knowledge of the shipper, cannot wholly abandon his duty in the former capacity to discharge that of the latter; but he must act in both as far as possible, with reference to the respective interests of his principal in each capacity.

SUPERCARGO WHO ABANDONS HIS TRUST OR DELEGATES HIS AGENCY, merely because the cargo could not be disposed of at one of the ports reached prior to the port of destination, is guilty of a violation of duty, and liable therefor.

SUPERCARGO IS NOT LIABLE IN DAMAGES because another party, wrongfully and without his privity, assumes authority to sell and does sell the cargo.

ASSUMPSIT to recover damages for loss on a sale of flour, shipped to "Valparaiso and a market," the loss being alleged to have been occasioned through the negligence and misconduct of the defendant, who was part owner and master of the ship, and also consignee of the flour. The opinion sufficiently states the facts for a proper understanding of the case.

William Schley, for the appellant.

John Nelson, for the appellee.

By Court, TUCK, J. The appellant sued the appellee to recover damages for losses alleged to have been sustained on the sales of flour shipped on board a vessel which sailed from Baltimore for "Valparaiso and a market," of which the appellee was part owner, master, and supercargo. Misconduct, negligence, and consequent liability are imputed to him in each and all of these capacities.

At the trial, fourteen prayers were offered by the appellant, all of which were refused except the last. They involve the con-

struction of the contract, and the extent and proper exercise of the discretion reposed in the appellee under the circumstances by which he found himself surrounded at his first port of destination, and afterwards in the progress of the voyage. The questions presented in the argument will appear by the statements and points filed, and we shall dispose of them in their order, first, however, stating generally the rules of law by which we suppose cases of this kind to be governed.

The principles which regulate the conduct of factors abroad apply to supercargoes: *Beawes' Lex. Merc.* 44, 47; *Story on Agency*, sec. 33. They are liable for injuries to the employer, occasioned by the want of reasonable skill or of ordinary diligence, by which is to be understood "such skill as is, and no more than is, ordinarily possessed and employed by persons of common capacity engaged in the same trade, business, or employment; and by ordinary diligence that degree which persons of common prudence are accustomed to use about their own business and affairs:" *Story on Agency*, sec. 183. They are also bound to good faith, and must exercise their judgment after proper inquiries and precautions, and where they have a venture on the same ship, they are bound to exercise at least as much diligence and care as to their factorage transactions as they do as to their own private concerns. And they are chargeable for negligence if they sell without making a proper inquiry after having received notice of facts which ought to put a person of prudence on his guard: *Id.*, sec. 186; *Russell on Factors and Brokers*, 33, 34. As a general rule, they cannot delegate their authority any more than other agents, but exceptions may arise where the power of delegation is conferred by the necessity of the case, the usages of trade, or the law and customs of the country where the agency is to be executed: *Story on Agency*, secs. 13, 14, 34 a; *Warner v. Martin*, 11 How. 209. Where, as in this case, the master is made consignee of the cargo, the duties and liabilities are as distinct as if confided to different persons: *Story on Agency*, sec. 41.

The responsibility of the defendant, in his capacity of part owner and master, arises from the sale of the ship, and the alleged improper delivery of the flour at Callao. It is the duty of the ship to convey the cargo according to the projected voyage, and this must be done by every reasonable and practical method. "Every act that is not properly and strictly in furtherance of this duty is an act for which both the master and owners may be made responsible:" *Abbott on Shipping*, 241.

There are emergencies under which a sale of the cargo, and even of the ship, may be justified, but the necessity of the case must require that course. This necessity may arise suddenly, and under circumstances that could not have been provided for. "In general, it may be said that in such a case the master is to do that which a wise and prudent man will think most conducive to the benefit of all concerned. Some regard may be allowed to the interest of the ship and its owners, but the interest of the cargo must not be sacrificed to it. Transshipment for the place of destination, if it be practicable, is the first object, because that is in furtherance of the original purpose; if that be impracticable, return or a safe deposit may be expedient. The merchant should be consulted, if possible. A sale is the last thing that the master should think of, because it can only be justified by that necessity which supersedes all human laws. If he sell without necessity, his owners, as well as himself, will be answerable to the merchant:" Abbott on Shipping, 243; 1 Arnould on Ins. 189, etc.; Smith's Merc. L. 171, 292.

As to the construction of the contract, that is, the meaning of the words to "Valparaiso and a market," we understand the counsel to agree that they must be interpreted according to the analogy of this case to one arising under a policy of insurance containing such a clause; and by this test, we think they authorized the ship to visit such other ports, beyond the one named, as the appellee thought expedient, in the exercise of a sound discretion: *Deblois v. Ocean Ins. Co.*, 16 Pick. 303 [28 Am. Dec. 245]. Whether he was under any obligation to seek a market this side of Valparaiso, or to go there in the first instance, we need not decide, inasmuch as he did visit the named port, and no question is made on this part of the case. These terms also imposed on the ship the carriage of the cargo until a market was found, or the goods left on deposit for sale under circumstances authorizing such a departure from the original contract of affreightment. In the case of *Richardson v. London Assurance Company*, 4 Camp. 93, the goods in question were the investment of an East India captain, and the voyage was described in the policy to be "at and from London to Madeira, the cape of Good Hope, and all or any of the ports or places in the East Indies, etc., until arrived at the last place of discharge on the outward voyage, with leave to exchange the goods in the course of the voyage." The company's cargo was discharged at Calcutta (a place within the policy), and the ship ordered with another cargo to Madras. The captain had also landed the

whole of his investment at Calcutta, and had disposed of a considerable part of it; but being unable to sell the residue, he resolved upon a new market, and for this purpose reloaded it on board the ship for Madras, on which intermediate voyage she was lost. The question was whether, under the terms of this policy, the risk still continued on the residue of the captain's investment on board at the time of the loss, or whether it had ended at Calcutta. Lord Ellenborough held that the risk had ceased at Calcutta, "the last place of discharge on the outward voyage." If, he said, "the company's officers wish for the protection which is here sought (that is, until the goods are finally disposed of in some market in the East Indies), they must not limit the risk to the duration of the outward voyage, but extend it to the arrival of the goods to a market at their final port of discharge." It is added by Mr. Arnould, vol. 1, p. 439: "There can be no doubt that an insurance in such form would effectually protect the goods until actually disposed of in some foreign market." If this be the liability of the insurers in such cases, it is clear that it is the ship's duty to carry the cargo until disposed of.

We proceed to apply these principles to the case before us. The first prayer was properly refused, because it submitted to the jury the finding of facts of which there was no sufficient evidence. One specification is sufficient. There was nothing from which the jury could have found that the defendant did not make reasonable efforts to sell the plaintiff's flour at a fair price at some one or more of the ports which he visited before he reached Callao. On the contrary, it was in proof that he had offered the flour at Arica, and not satisfied with the prices there, said he was going to Lima, of which Callao is the outer port, because he had received advices of better prices at that place. In the absence of evidence of such negligence and misconduct, the law does not presume that he did not make reasonable efforts to effect sales at such ports as he thought it expedient to visit, as it was his duty to have done; and especially as that presumption is rebutted by the consideration that it was his interest, as part owner, to sell the cargo as soon as practicable. And even if he could have made sales at Arica or elsewhere, he had a discretion to do so or not, provided it was fairly exercised. The nature of the voyage—for a named port and a market—necessarily implied, as we have seen, that he was not bound to sell at the first or any other port if he had reason to believe that he could find a better market by going

farther, and acted in good faith on such information. We may illustrate this view (and the same applies to propositions presented by some of the other prayers), by supposing that with the advices he had received at Valparaiso before him he had sold the plaintiff's flour at Arica for the price offered, and had then sailed for Lima, and there sold his own flour at the higher price named in his advices. Would not the plaintiff have had good reason to complain that he had sold his flour at the wrong market? Yet when he has acted upon the information received, and loss has occurred to the plaintiff, he is charged with negligence. Certainly the result should not alter the application of the principle.

Objections equally fatal apply to the second, third, and fifth prayers. The second is based in part on the first, besides embodying other propositions of fact without evidence to sustain them, which we need not indicate.

The third is objectionable for the reason that there is nothing to show that the purchaser of the one hundred and fifty barrels sold at Arica was willing, or unwilling, to have taken any of the plaintiff's flour as part of the quantity he wanted. To fix liability on the appellee in this aspect of the case could only be done by drawing an inference against his interest and duty, when there is nothing in his management of the cargo up to that time to show that he was not governed by a desire to promote the interests of all concerned. Flour is sold by the brand it bears, and there is no evidence that the purchaser at Arica wanted any other than the particular kind that he bought, and the plaintiff's flour was not of that brand. Besides, this prayer imputes to the appellee not only gross negligence, but want of good faith to the owners of the cargo, against the presumption that an agent has done his duty until the contrary appears: *Corner v. Pendleton*, 8 Md. 337.

The motive attributed to the appellee by the fifth prayer, for not selling all the flour at Arica, is not warranted by the proof, but in conflict with the only evidence on the point. Wysham proved that the appellee's reason, as he informed him at the time, for not selling there at less than nine dollars and a quarter was, that from information received he expected to obtain ten or ten and a half at Lima. In the face of this proof, and in the absence of any sustaining the theory of the prayer, it was impossible for the jury to have found that he did not sell at Arica because of an unwillingness to reduce the price of his

own flour to an average less than he could obtain for the quantity which he actually sold.

In addition to the above views, all the preceding prayers proceed, in part, on an assumed violation of duty which the law does not infer, denying to the appellee any discretion whatever; whereas, as we have seen, the doctrine is well settled that persons in his capacity are often compelled to act in a manner which the law does not sanction, if access can be had or information given to, and directions received from, the principal. If the law were otherwise, it is difficult to imagine that such agencies would be accepted at all, imposing liability for mere errors of judgment, committed in the honest exercise of discretionary powers.

We entertain, however, a different view of the propositions presented by the sixth prayer. The ship arrived at Callao on the fifth or sixth of October, as proved by Wysham and Dartnell. The appellee wrote, on the thirteenth, that the flour had kept perfectly sweet, that he had sold it at eight dollars, and that the vessel also was then disposed of. Wysham proved that the vessel was sold, to be delivered in ten days, and that after that sale the defendant caused all the flour to be landed on the mole, when there was no storage for it, and that it was injured by such exposure; though on this point, and as to the condition of the flour at the time of arrival, there was conflicting evidence.

One of the witnesses also stated that sample barrels were sent ashore, which were tried, and the flour pronounced sour, and that the appellee had all the flour delivered on the mole after he knew that the first purchase had been thrown up. Now, if the appellee had not discovered on the thirteenth that the flour was damaged—and that he had not is clear from his own letter—the inference is that he sold the vessel before the cargo had been landed, and (according to the evidence of the mate) that it was landed after he knew its unsound condition, and before he had made a second sale, or obtained storage for it. Upon the state of case submitted to the finding of the jury by this prayer, if the appellee landed the flour “in order that he might be ready and prepared to deliver the vessel pursuant to the terms of the contract of sale,” and the flour was injured by such exposure on the mole, the plaintiff was entitled to recover for the loss resulting from such disposal of the cargo. Upon this hypothesis, there was no excuse for landing the flour at all without first having made sale of it, or obtained proper storage; and the case is stronger against him if, as he wrote and Wysham

states, the flour was sweet. The prayer ascribes a motive for the landing, to be found by the jury, inconsistent with the interest of the shippers, and merely looking to the interest of the ship-owners, and which, if true, was, 'to the extent of the damage thereby incurred, a sacrifice of the interest of the cargo to that of the owners of the vessel: Abbott on Shipping, 243. We have seen that the ship may be sold under pressing emergencies, but there was no such necessity if the hypothesis of the prayer be correct. The counsel for the appellee adverted to the letter of Wysham & Co., in which it is said, "It is possible you may sell the vessel," for the purpose of showing that the plaintiff knew, at the time of the shipment, that a sale was in contemplation. This letter had reference to a return cargo; we suppose that it was never imagined by any of the parties that the vessel would be sold before the flour was disposed of. The ship may always be sold if the owner or the master choose to violate a duty. It cannot be prevented. But the power to sell is subordinate to the claim of the cargo to be carried and delivered according to the projected voyage; and that the owners of this cargo knew that the vessel might possibly be sold can have no effect upon their claim for damages if they incur loss by the sale. The obligation to carry the cargo is generally paramount to every other duty, and yields only to that "necessity which supersedes all human laws." Id. True, the appellee had an interest in selling the ship, but he had also incurred an obligation to the plaintiff; and, as was said by Lord Ellenborough in *Thompson v. Havelock*, 1 Camp. 528, "no man should be allowed to have an interest against his duty."

According to the rules governing the case as applied in disposing of the first prayer, we think there was no error in refusing the seventh. There was nothing to show that the conduct of the appellee at Arica was different from what a prudent and judicious owner would have done under the same circumstances and with the same advices before him.

If, as stated in the eighth prayer, the defendant, not having found a market, had the flour landed, and placed and left on the mole at Callao, and if it became damaged before a sale could be effected, by reason of exposure there for six or eight days, it was very clear that he was liable for the consequences. This, however, was for the jury, about which there was evidence on either side.

We think the ninth prayer was properly refused. It is merely speculative as to losses that might have resulted from landing

sour flour in violation of the local laws. But as the flour was not seized and condemned under these laws, the plaintiff cannot be said to have suffered by an act subjecting the flour merely to the risk of being taken and destroyed, in the absence of proof that such violation of the law did place the defendant in the power of dealers in the article, whereby loss was actually incurred by the plaintiff.

The tenth, eleventh, and twelfth prayers relate to the expenses of landing, reshipment, and freight of the flour that was sent to Paita. It was the duty of the ship to have carried the flour to a market, or until finally landed under circumstances authorizing a departure from the original contract, which, as we have said, had not occurred at Callao; consequently the plaintiff was not liable for the freight from Callao to Paita. This prayer leaves out of view the sale of the vessel; but as the carrying of the cargo according to the contract is the master's first duty, it lies on the defendant to excuse himself for having forwarded part of the flour to Paita on another vessel, and he cannot charge for such freight.

The eleventh and twelfth prayers ought also to have been granted, upon the hypothesis of the tenth. Until the flour was sold it ought not to have been landed. The landing without a previous sale was such an act as to relieve the consignor of the flour from all liability for the charges of landing and reshipment. The thirteenth prayer seeks to charge the appellee, as supercargo, for a conversion of the flour, by having sent it to Paita for sale by another person. We have seen that emergencies may arise to render a deposit of the cargo necessary; as, for example, the sale of the ship, or the want of a market, because a sale cannot be made if a purchaser cannot be found; and other circumstances may arise justifying this course; and if the consignee acts in good faith, with reference to his predicament at the time, he ought not to be censured. The general rule is, that the trust cannot be delegated, but this is not without exceptions. "The authority is exclusively personal, unless, from the express language used, or from the fair presumptions growing out of the particular transaction, or of the usage of trade, a broader power was intended to be conferred on the agent:" Story on Agency, sec. 14. Where the consignee is master, and this is known to the shipper, he cannot wholly abandon the latter duty to discharge that of supercargo; he must act in both, as far as possible, with reference to the interest of the respective principals: *Day v. Noble*, 1 Johns. Cas. 174; S. C., 2 Pick. 615.

There is nothing stated in the prayer to excuse the consignee; but it goes upon the ground that he abandoned his trust to another, merely on finding that the flour could not be disposed of at Callao. In this view we think the first branch of the prayer, if offered alone, might have been granted. But it went further, and asked to recover the value of the flour, if the jury found that some other person assumed to sell it in the absence of the defendant, and without his knowledge or approval of the terms of sale. Of course such a sale would not divest the title of the plaintiff; but it does not follow that the defendant would be liable because another person wrongfully, and without his privity, had assumed authority to dispose of it. As an entirety, the prayer was faulty, and properly refused.

It follows that, dissenting from the rulings below on the sixth, eighth, tenth, eleventh, and twelfth prayers, the judgment must be reversed, and a *procedendo* ordered.

Judgment reversed and *procedendo* ordered.

SUPERCARGOES, WHO ARE, AND THEIR RIGHTS, DUTIES, AND LIABILITIES.—Supercargoes are defined to be "persons specially employed by the owner of a cargo to take charge of and sell to the best advantage merchandise which has been shipped, and to purchase returning cargoes, and to receive freight, as they may be authorized:" Bouv. Law Dict. Another definition, perhaps more accurate, is the following, given in Beawes' Lex. Merc. 47, viz.: "Supercargoes are persons employed by commercial companies or by private merchants to take charge of the cargoes they export to foreign countries, and to sell them there to the best advantage, and to purchase proper commodities to relade the ships on their return home. They usually go out with the ships on board of which the goods are embarked, and return home with them, and in this differ from factors, who reside abroad." Supercargoes are properly a class of factors, and are bound by the rules generally applicable to the latter: Story on Agency, sec. 33. As to the general law relative to factors, and their duties and responsibilities, see the extensive note on that subject to *Bigelow v. Walker*, 56 Am. Dec. 158-171. The general definition of a factor, however, is said not to be applicable to a supercargo. The latter are only *quasi* factors, possessing, indeed, the character of factors, inasmuch as they are general agents to purchase goods with proceeds of cargoes consigned to them, but differing in this, that they usually go out and return home with the ships on board of which such cargoes are embarked: Russell on Factors and Brokers, 2, note c; *Davidson v. Gwynne*, 12 East, 381, 396. A supercargo, unless his authority be expressly or impliedly restrained, must from the nature of his employment be invested with a complete control over his cargo and everything which immediately concerns it, and that embraces even its destination: *Davidson v. Gwynne*, *supra*; but the supercargo has no power to interfere with the government or navigation of the ship: 2 Pardessus Droit Commercial, sec. 646. Where the master of a vessel is also the consignee of his cargo, he assumes the capacity of supercargo: *Biss v. Lawrence*, 3 T. R. 454; *Smedley v. Yeaton*, 3 Cranch C. C. 181; and when acting in such capacity, is the agent of the consignor: *The Waldo*, 2

Ware, 161; *Williams v. Nichols*, 13 Wend. 58; *Stone v. Waitt*, 52 Am. Dec. 621. Though not named as such, in case of urgent necessity the master of a vessel may be clothed with the authority of supercargo, and in such case he is bound to act to the best interest of the shipper: *The Viona*, 3 Ware, 140; *The Gratitude*, 3 C. Rob. 240. In cases where the master of a vessel acts as supercargo, his duty in each capacity is distinct and independent: *Courcier v. Ritter*, 4 Wash. 552; *The Waldo*, 2 Ware, 161; *Dusar v. Perit*, 4 Bing. 361; and is as separate as though confided to different persons: *Earle v. Rowcroft*, 8 East, 126; *Crousillat v. Ball*, 4 Dall. 294; *The St. Nicholas*, 1 Wheat. 417; *Kendrick v. Delafield*, 2 Cal. 67; *Cook v. Commercial Ins. Co.*, 11 Johns. 40; *The Vrow Judith*, 1 C. Rob. 150; *Williams v. Nichols*, 13 Wend. 58. In case of necessity, a supercargo may bind the owner and his principal by sale or pledge of part of the cargo, or otherwise, before reaching the port of destination: *Forrestier v. Bordman*, 1 Story, 43; but a supercargo of various shipments by the same vessel cannot pledge them in a mass to secure advances so as to bind his principals, but he must keep the interests separate: *Newbold v. Wright*, 4 Rawle, 195. Supercargo, also master, arriving at port of destination, acts as agent of consignor in disposing of the goods: *Stone v. Waitt*, 52 Am. Dec. 621; and if at such port he is unable to effect a sale, he is justified in leaving the goods there with a responsible party for sale: *Stone v. Waitt*, *supra*; *Day v. Noble*, 2 Pick. 616; *Lawder v. Keaquick*, 1 Johns. Cas. 174; and a consignee thus selected by the supercargo becomes the agent of the shipper, and is liable to him: *Merrick v. Bernard*, 1 Wash. 499; and if the supercargo should die, his representatives would not be liable for the consignee's acts which are not imputable to instructions from the supercargo during his life-time: *Pawson v. Donnell*, 19 Am. Dec. 213. The right of a supercargo to compensation is extinguished or ceases by the breaking up of the voyage, or any similar circumstance whereby he is discharged from the performance of all duties as such: *Pawson v. Donnell*, *supra*. A supercargo may retain goods for any general balance due him by the owners: *Vowell v. West*, 4 Cranch C. C. 100; *Luckett v. West*, Id. 101. A supercargo who engages to transport goods at his risk becomes personally liable therefor, and is responsible on the goods being stolen: *Bridge v. Austin*, 4 Mass. 115. The shipper of goods by receiving the proceeds without objection ratifies a sale by a supercargo: *Forrestier v. Bordman*, 1 Story, 43.

ORDINARY AND REASONABLE CARE AND DILIGENCE, DEFINITION OF: See *Freer v. Cameron*, 55 Am. Dec. 671, note.

WANT OF EVIDENCE ON WHICH TO BASE INSTRUCTION AND SUBMISSION OF QUESTION TO JURY will render instruction erroneous if given: See *Johnson v. Jennings*, 60 Am. Dec. 323; *Duggins v. Watson*, Id. 560.

MAYOR AND CITY COUNCIL OF BALTIMORE v. MARRIOTT.

[9 MARYLAND, 160.]

STATUTE CONFERRING ON MUNICIPAL CORPORATION "FULL POWER AND AUTHORITY to enact and pass all laws and ordinances necessary to preserve the health of the city, and to prevent and remove nuisances," will impose on the city liability for causing or not removing nuisances, to any person who has received special damage therefrom; the exercise of the

power conferred being for the public good, and so not merely discretionary, but imperative, and the words "power and authority" in such case meaning duty and obligation.

MUNICIPAL CORPORATION, BY MERE PASSAGE OF ORDINANCE providing for removal of snow and ice from streets, so as to prevent their accumulation from becoming a nuisance, does not thereby discharge itself from the duty imposed by a statute authorizing it to prevent or remove nuisances, but the municipality must, under such statute, make vigorous efforts to enforce such ordinance, in order to bring itself within the saving of having used reasonable care and diligence in removing the nuisance complained of.

DAMAGES ARE NOT RECOVERABLE FOR INJURY RESULTING FROM NUISANCE unless party suing show reasonable and ordinary care and diligence on his part to avoid the injury.

INCONVENIENCE OR INJURY RESULTING IN COMMON TO ALL CITIZENS from the same source of complaint is a common nuisance, and the remedy therefrom must be by indictment.

CASE to recover damages for injury sustained by plaintiff in consequence of defendants' alleged negligence in not preventing or removing an accumulation of ice in one of defendants' streets. The opinion states the case.

Grafton L. Dulany, for the appellants.

Vivian Brent and Charles E. Phelps, for the appellee.

By Court, **MASON, J.** This action was brought to recover damages for an injury sustained by the plaintiff, in consequence of the alleged negligence of the defendants in not preventing or removing an accumulation of ice on the footway on Fayette street, Baltimore, upon which the plaintiff slipped and fell, and broke his knee-cap, whereby he became lame and crippled for life.

There is no dispute about the facts. That the ice had accumulated and been suffered to remain on the sidewalk for a long time, to the great inconvenience and even danger of persons passing, and that the plaintiff actually fell and seriously injured himself, there is no doubt. But the questions presented upon this record are: 1. Is a municipal corporation like the city of Baltimore responsible at common law, as individuals are, for the consequences of causing or not removing nuisances? 2. If not, has this corporation been made so responsible by any act of our assembly? and 3. If responsible in either aspect of the case, does the evidence disclose that the plaintiff has received such special or particular damage from this nuisance, which is not common to all the community, and which will entitle him to maintain the present action?

We will first proceed to consider the second general proposition, viz., the liability of the city under the statutes.

The act of 1796, chapter 68, incorporating the city of Baltimore, among other things, provides that the corporation "shall have full power and authority to enact and pass all laws and ordinances necessary to preserve the health of the city, and to prevent and remove nuisances." It is a well-settled principle that when a statute confers a power upon a corporation to be exercised for the public good, the exercise of the power is not merely discretionary, but imperative, and the words "power and authority," in such case, may be construed "duty and obligation."

Whether the obligations and liabilities which attach to the individual in regard to nuisances apply or not equally to corporations at common law, it is not now necessary for us to determine. We are of opinion that the effect of the provision in the statute just cited was to place the corporation of Baltimore, in regard to their obligations to prevent and remove nuisances, upon the same footing which is held by individuals and private corporations. The people of Baltimore, in accepting the privileges and advantages conferred by their charter, took them subject to the burdens and restrictions which were made to accompany them under the same charter. One of those burdens was the obligation to keep the city free from nuisances. A disregard of the obligation thus imposed would be attended with the same consequences which would result to the individual at common law were he to disregard his obligations to the community in this particular. As the duty is the same in the corporation and the individual, so are the consequences the same for its disregard. The only difference is, that the common law imposes the duty upon the individual, while a statute of our state imposes it upon the corporation. To say that, under the statute, the city of Baltimore is bound to prevent nuisances, and yet to add that none of the common-law consequences attach for not doing so, is to assert what would amount to a contradiction of the first proposition, and virtually affirms that the city is not bound to remove or prevent nuisances. The counsel for the defendants seems rather to admit this position, that the city would be responsible if this obligation was not discharged, but seeks to establish the proposition that the passage of the ordinances given in evidence, providing for the removal of ice and snow from the streets, operated as a full discharge of the city's obligations, and will constitute a complete defense to all actions

like the present. In order that the city should relieve itself from this obligation, it was not only necessary that it should pass ordinances sufficient to meet the exigencies of the case, but it was also bound to see that those ordinances were enforced. To pass an ordinance and not enforce it would be the same as if none had been passed, so far as the public interests were concerned. There is no evidence in this record of any effort on the part of the city to enforce their ordinances on this subject; but, on the contrary, it appears they were suffered to sleep as dead-letters on its statute-books. To have enforced them was necessary to bring the city within the saving of having used reasonable care and diligence in removing the nuisance complained of. In the case of *Pittsburgh City v. Grier*, 22 Pa. St. 65 [60 Am. Dec. 65], the court very justly remarked, upon a case very similar to the present, that "it is no matter whether that duty [removing a nuisance] remains unperformed because she has no ordinances on the subject, or because, having ordinances, she neglects to enforce them. The responsibilities of the corporation are the same in either case." In the same case, page 67, the court further say, "They ought to have performed that duty with vigilant fidelity."

We are not prepared to say that had the city, after it had passed its ordinances upon this subject and endeavored to enforce them with vigilance and energy, would not thereby have so far used ordinary care and diligence as to have exempted them from responsibility upon an action like the present. But this does not appear to have been done; at least, there was no proof of it, although the nuisance complained of had existed for a long time before the accident to the plaintiff occurred. And besides, the defendant, by modifying its second prayer, which was granted by the court, could have secured all the advantage to which it was entitled upon this point. That prayer was as follows:

"2. If the jury believe that the accident happened to the plaintiff by reason of the ice being upon the pavement, and that said ice could not have been prevented from being on said pavement, whereby the injury was occasioned, at the time of said accident, but that it was owing to causes which could not have been prevented by ordinary and reasonable care and diligence of the mayor and city council, that then the plaintiff is not entitled to recover."

Under it, evidence showing due care and diligence might have been offered, and the court might, in addition, properly have

told the jury that a vigorous effort to enforce their ordinances on this subject, on the part of the city, would have amounted to such care and diligence, and thus have relieved them from responsibility. Were this not so, there would be no telling how far the city might be made liable for failure to remove nuisances. Great public immorality might be regarded as a nuisance, and every wrong or injury resulting from such a source might be laid to the city's account, notwithstanding every effort, through its police, had been made to suppress such immorality and vice. The same might be said of causes producing epidemics and the like.

It was also necessary that the plaintiff should, on his part, show "reasonable and ordinary care and diligence, whereby he might have avoided the injury sustained by him." But the defendants had the full benefit of this legal principle by having their third prayer (which embraced the proposition) granted. The only proposition, then, advanced by the defendants, which was denied, was that which affirmed that the mere passage of the ordinances for removing the snow and ice, etc., operated as a discharge of the city from responsibility. For the reasons already assigned, we think the court was right in not adopting this proposition as law.

We think, also, that the plaintiff's prayer was properly granted, as containing the whole law of the case upon the proof legitimately offered. That prayer was as follows:

"If the jury find from the evidence in the case that ice had accumulated in large quantities on the public footway on the north side of Fayette street, between St. Paul and Calvert streets, in the city of Baltimore, completely covering the said portion of said footway in such manner as greatly to obstruct, inconvenience, and endanger the public in walking along and over said footway; and if the jury further find that the said obstruction could have been removed, or the danger and inconvenience therefrom remedied by the use of proper care and diligence on the part of the defendant, or its proper agents appointed for that purpose; and if the jury further find from the evidence that the defendant and its proper agents aforesaid had notice, or might by care and diligence have obtained notice, of such obstruction by ice as aforesaid, a sufficient time to have removed the same before the occurrence of the injury complained of—then it was the duty of the said defendants or its agents to have removed the said obstruction in a reasonable time after notice thereof, or after they might have obtained notice thereof,

by the use of ordinary care and diligence; and if the jury further find that the plaintiff, while exercising ordinary care and diligence on his part, received the injury complained of, by falling on said obstruction by ice, and that such injury occurred after the lapse of a sufficient time from the notice of such obstruction to the defendant or its said agents, or from the period when the defendant or its agents might have obtained notice thereof by the exercise of ordinary care and diligence, then the plaintiff is entitled to recover such damages, by reason of his injury, as the jury may think he has sustained under the circumstances."

The only questions remaining are, Was the condition of the street which led to the accident such as to amount to a nuisance? and if so, has the plaintiff sustained such an injury, special and peculiar, as will entitle him to recover?

There can be no doubt from the evidence in the case, and it seems not to be controverted by the defendants, that the condition of the street was a nuisance. It is equally clear, too, that the plaintiff has sustained such an injury as will entitle him to maintain this action. Where a party sustains an inconvenience or injury which is experienced in common with all the citizens, then the source of complaint becomes a common nuisance, and the rule of law is clear that the remedy must be by indictment. But on the contrary, notwithstanding the party producing the nuisance may be indicted, yet if its existence has produced special and particular damages to an individual, the latter may maintain a special action against the wrong-doer. The law upon this particular point is correctly and fully stated in the case of *Stetson v. Faxon*, 19 Pick. 147 [31 Am. Dec. 123]; and by Judge Archer, in an opinion delivered in the Baltimore county court, in the case of *Barron & Craig v. City of Baltimore*, reported in 2 Am. Jur. 203, in the year 1828.

The view we have taken of this case does not conflict, in our judgment, with the decision of the supreme court in the case of *City of Providence v. Clapp*, 17 How. 161.

In that case the court say: "It is admitted that the defendants are not liable for the injury complained of at common law, but that the plaintiff must bring the case within the above statute to sustain the action." We have said in this case that the liability of the defendants is fixed by the statutes of our state, and nothing more.

The general liability of a municipal corporation like the present, in actions of this kind, has been recognized by a number

of well-adjudged cases, many of which resemble the case at bar: *Erie City v. Schwingle*, 22 Pa. St. 384 [60 Am. Dec. 87]; *Pittsburgh City v. Grier*, Id. 54; *Delmonico v. New York City*, 1 Sandf. 222 [31 Am. Dec. 157]; *Thayer v. City of Boston*, 19 Pick. 511; *Henly v. Mayor of Lyme*, 5 Bing. 91, and others.

Judgment affirmed.

KUNKEL v. SPOONER.

[9 MARYLAND, 462.]

RECORD ON APPEAL IS CONCLUSIVE IN APPELLATE COURT in regard to a statement appearing therein that a plea of limitations was stricken out because it appeared to the court that it was not filed "on or before the day designated and fixed by the rules of the lower court for the filing of such pleas," if the rules of the court do not appear in the record, and there is an absence of any proof to the contrary.

PLEA OF LIMITATIONS IS NOT PLEA TO MERITS, and must be filed by the rule day, and is never allowed to be amended.

HOLDER OF NEGOTIABLE PROMISSORY NOTE INDORSED IN BLANK has a *prima facie* title thereto, which, in the absence of proof of *mala fides*, will entitle him to sue on it in his own name.

POSSESSION OF NEGOTIABLE PROMISSORY NOTE INDORSED IN BLANK by the attorney of a party is possession by the party himself.

PROTEST AT REQUEST OF BANK OF NOTE INDORSED IN BLANK, and which does not bear the name of the bank, is not, in a subsequent suit in the name of a holder, any more evidence of the ownership of the note by the bank at the time of the protest than that at the time of the protest the bank was the collecting agent for the real owner, nor does it show that the holder after protest was not the owner who placed it in the bank for collection, so as to defeat the former's *prima facie* right of action based on possession.

ASSUMPSIT on a promissory note. The opinion states the case.

Joseph M. Palmer, for the appellants.

Bradley T. Johnson, for the appellee.

By Court, EGGLESTON, J. This is an action of *assumpsit*, instituted by the appellee against the appellants. The first count in the *narr.* is upon a promissory note, and the second is *insimul computasset*.

The defendants put in three pleas, the first *non assumpsit*, and the second and third limitations.

It appears from the record that the day on which the second and third pleas were filed, the plaintiff's attorney moved the court to strike them out, which motion was resisted by the attorney for the defendants. The record then states: "Where-

upon, all and singular, the premises being seen and heard, and by the court fully understood, and it appearing to the court here that the said plea of the said defendants, by them above pleaded, was not filed in the said cause on or before the day designated and fixed by the rules of the court here for filing pleas of the statute of limitations, etc. It is therefore considered by the court here that the second and third pleas of the said defendants, by them above pleaded, be stricken out," etc. And then issue was taken upon the plea of *non assumpsit*, upon which the case was subsequently tried. During the trial the counsel of the defendants asked the court for an instruction to the jury, which was refused, and that refusal was excepted to. The verdict and judgment being in favor of the plaintiff, the defendants appealed.

The first question presented by the argument is whether the court erred in striking out the second and third pleas.

It is insisted by the appellants that the *onus* of showing the decision of the motion to strike out is correct rests upon the appellee; that it was his duty to have the rules of court bearing on the subject set forth in the record, and that not being done, there is nothing from which it can legitimately appear the pleas were not filed in due time; the mere statement of that fact in the judgment or order not being sufficient for such a purpose, consequently the appellate tribunal must say there was error in sustaining the motion below. This theory, however, is inconsistent with several adjudged cases relating to the action of the courts in reference to their rules.

In *Rigden v. Martin*, 6 Har. & J. 467, it is said: "There is nothing in the objection that the decree was passed without setting the cause down for hearing. The court state the cause then stood ready for hearing, and we will presume all prerequisites were complied with." Various grounds were taken for reversing a decree in *Fitzhugh v. McPherson*, 9 Gill & J. 51, one of them being that a certain order had not been properly served. But on page 71, in delivering the opinion of the court, Judge Dorsey says: "In the absence of all direct proof to the contrary, we regard the statement of the chancellor, in his order of the first of April, 1834, 'that the above-mentioned order had been duly served,' sufficient evidence to the truth thereof." And reference is made to *Rigden v. Martin*, *supra*.

We find it said by the same able judge, speaking for the court, in *Cahwell v. Boyer*, 8 Gill & J. 148: "The third ground relied on by the appellants is because the order to take the bill

pro confesso, and to issue an *ex parte* commission, passed before the rule to answer expired. We do not feel ourselves at liberty to say that there has been any irregularity in the passage of this order. Neither the rules of Harford county court upon this subject, nor the time of holding its intermediate terms prescribed by law appearing before us, and the court certifying that the time to answer had elapsed, we will, in the absence of all proof to the contrary, assume the verity of their statement, and presume that the order *pro confesso* was legitimately passed. There is nothing in the record to show that the rule to answer extended to the August term. It may, by the rules of the court, have been limited to some intermediate day, or to the intervening equity term of the county court."

The case of *Benson v. Davis's Adm'r*, 6 Har. & J. 272, has been referred to in support of the appellants' view, that because the rule of court is not in the record, so as to show the correctness of the decision based upon it, the judgment must be reversed, notwithstanding the statement by the court of the ground on which the pleas were stricken out. In the case referred to, the plaintiff was under a rule to file his *narr.* on the first Monday of March term, 1821. The formal parts of the original and amended records, both of which we have examined, state that on the first Monday of March, 1821, Benson filed his declaration; and after setting out the *narr.*, a rule on Davis to plead is stated, as if laid on the same day. The cause is then said to have been continued until the second Monday of November following. And immediately after stating the appearance of the parties on that day, the amended record proceeds thus: "Thereupon it appears to the court here that the declaration aforesaid of the said John Benson, in the plea aforesaid, was not filed in court here in the said plea on or before the first Monday in March, in the year of our Lord one thousand eight hundred and twenty-one, but that the said declaration was filed, in the plea aforesaid, on the eighteenth day of May of the same year; and because the said declaration was not filed, in the plea aforesaid, on or before the said first Monday of March, eighteen hundred and twenty-one, it is therefore considered by the court here that the said John Benson take nothing by his declaration aforesaid," etc.

This judgment of *non pros.* was reversed by the court of appeals, as their opinion clearly shows, upon the principle that although a plaintiff fails to file his *narr.* by the rule day, but it is filed afterwards, and received, and the defendant is laid under

a rule to plead, he has no right then to take advantage of the laches of the plaintiff. The plaintiff was under a rule to plead by the first Monday in March, 1821, on which day the March term commenced, and the court say, "must have been continued or adjourned to the following May, for we find the declaration was filed on the eighteenth of May, and a rule laid on the defendant to plead as of March term." The case was continued under the rule to plead to November term, when the judgment of *non pros.* was entered, because the *narr.* had not been filed by the first Monday in March.

Under such circumstances, the court of appeals might well say: "If there are any rules of practice in Montgomery county court that justify the procedure in this case, they ought to have appeared in the record. In their absence, we cannot conceive upon what principle the judgment of *non pros.* was entered."

From this, however, it is by no means a correct inference that if the judgment had simply stated it was rendered because the *narr.* had not been filed by the rule day, there being no proof to the contrary, and nothing to show that, although filed after the rule day, it had been received, and the defendant laid under a rule to plead, that the judgment would have been reversed because the rules were not set out in the record.

When the court used the language we have quoted in regard to the absence of any rules to justify such a procedure, we understand them as meaning to express strong disapprobation of a *non pros.* in such a case. And therefore, not being able to conceive upon what principle it was rendered, if there were any rules so directly opposed to their views of correct practice as to justify such a procedure, they ought to have appeared in the record. But surely they could not have been unable to conceive upon what principle a judgment of *non pros.* had been entered, if in that judgment the court had merely said it was because the *narr.* had not been filed by the rule day, and there was nothing to show the statement to be incorrect, or to show any error in the judgment. And we certainly have no difficulty in conceiving, in the absence of the rules in the present record, upon what principle the second and third pleas were stricken out when the court have said it was because they were not filed on or before the day designated and fixed by the rules of the court for filing pleas of limitations. In regard to such pleas, it is said, in *Wall v. Wall*, 2 Har. & J. 81: "The plea of limitations has been adjudged not to be a plea to the merits, and the universal practice

has accordingly been never to permit it to be amended, and to demand that it should be filed by the rule day."

In that case the rules of court were not made part of the record, and the opinion of the court, as set forth in the exception, was used as evidence in connection with other parts of the bill of exceptions to show that the plea was required to be filed at length, and by the rule day.

In *Brice v. Randall*, 7 Gill & J. 349, bills of exceptions were taken, but they contained no evidence whatever; the prayers only were set forth in them.

In delivering the opinion of the court, Judge Archer says: "Anterior to the act of assembly of 1825, c. 117, the court would have entertained the appeal, and would have determined the law of the prayers, upon the assumption that there was evidence upon which the prayers might be bottomed. The act of 1825, c. 117, requires this court to review the points decided below, and if in the case in *Barnes v. Blackiston*, 2 Har. & J. 376, the court were bound to consider that evidence was offered below which would have justified the action of the court, such a rule would and must lead us to the same conclusion here; and on the supposition that there was evidence before the court and jury, the question presented is sufficiently pointed and specific to call for the judgment of this court." The decisions in the cases which have been noticed do not, in our opinion, justify a reversal of this judgment, upon the ground that there was error in striking out the pleas of limitations.

The note sued upon was drawn by the defendants in favor of "E. Levick & Co.," or order. It was indorsed in blank by "Eben'r Levick & Co.," and upon it are also the names of "Corner, Willow & Gardner," and "G. & J. P. Steiner." It became due the eighteenth to twenty-first of April, 1848, and on the twenty-first of April was protested at the request of the Bank of Penn Township, in the county of Philadelphia. The suit was instituted by William M. Merrick, esq., as attorney for John H. Spooner, the plaintiff; and the same day on which the summons was ordered and issued, Mr. Merrick, as attorney for the plaintiff, filed a *narr.*, the note, and the protest, the *narr.* having upon it this indorsement: "The clerk will file this *narr.*, note, and protest, and issue summons for defendants. William M. Merrick. May 12, 1854."

It is admitted that John B. Kunkel and Philip Kunkel were partners at the time of the execution of the note, and that John B. Kunkel signed the note by and under the firm name of John B.

Kunkel & Co. Evidence was offered to prove the indorsement by E. Levick & Co. The plaintiff also gave in evidence to the jury the note with the protest; and the defendants offered no testimony or evidence of any kind. They however prayed the court to instruct the jury, "that from the pleadings and evidence in this case the plaintiff is not entitled to recover;" and assigned eight reasons why he should not:

1. Because there is not any legal evidence in this case before the jury sufficient to entitle the plaintiff to recover the amount of said promissory note against the defendants.

2. Because the said John H. Spooner, the plaintiff, has not offered a particle of evidence to the jury to prove that he has or ever had any right or interest in the promissory note in question, against the defendants, so as to enable him to sustain a suit on said promissory note in his own name.

3. Because there is no evidence in this case to show that the said plaintiff was ever in the possession of said promissory note, or that the same belongs to him by delivery or otherwise, or that he ever had any interest in said promissory note.

4. Because there is not a particle of evidence in the case to prove that the Bank of Penn Township, in the county of Philadelphia, the holder and owner of said note, on the twenty-first of April, 1848, when it matured, has ever transferred its interest to said promissory note to the said plaintiff, either by indorsement or delivery; and because there is no evidence in the case from which the jury can legally infer that the promissory note in question was ever in the possession of the plaintiff, or that he ever had any right or title thereto by indorsement and delivery, so as to enable the said plaintiff to sustain a suit in his own name.

5. That in order to entitle the plaintiff to recover in his own name in this case, there must be evidence that he was, at the time of instituting the suit in this case, the holder and owner of the promissory note in question.

6. Because there is no evidence in the case to prove that the plaintiff ever had the possession of the promissory note in question, or any title or interest thereto, so as to give him a right of action against the defendants.

7. Because there is a material variance between the allegations in the plaintiff's declaration and the evidence offered by the plaintiff to the jury to sustain said allegations in said declaration, in this, that the promissory note in question varies materially from the one declared upon by the plaintiff.

8. Because it appears, from the plaintiff's own evidence, that the promissory note in question belongs to the Bank of Penn Township, in the county of Philadelphia, and that they were the holders of said promissory note at the time this action was instituted. The instruction asked for was refused, and the defendants excepted.

The seventh reason, which is in relation to a variance between the *allegata* and *probata*, has been abandoned.

It is conceded that Mr. Merrick, as attorney for the plaintiff, ordered the writ in this case; that at the time of doing so he filed the *narr.* as said attorney, and with it the note and protest, which, at the trial, were offered in evidence on the part of the plaintiff.

It is certainly true, as a general rule, that possession by the attorney of a party is possession by the party.

In *Whiteford v. Burckmyer*, 1 Gill, 145 [39 Am. Dec. 640], it is said: "Possession of a note indorsed in blank will enable the party having it to maintain suit, except *mala fides* be proved. Courts will never inquire whether a plaintiff sues for himself or as trustee for another; nor into the right of possession, unless on an allegation of *mala fides*." And again, on page 146: "A bill payable to bearer, or a bill payable to order and indorsed in blank, will pass by delivery, and bare possession is *prima facie* evidence of title; and for that reason, possession of such a bill will entitle the holder to sue."

On page 147 the court further say: "The act of 1825, c. 35, provides that no judgment shall be set aside because of the indorsement being in blank; and in effect gives to a plaintiff all the advantage from a blank indorsement which he could derive from an indorsement in full, so far as his right of action is affected. Any holder, therefore, with a blank indorsement, may now sue in his own name; but the act of 1825 cannot be construed to extend the right of action to one who has no interest in the bill, either as holder or owner."

The principles contained in the first quotation from the case of *Whiteford v. Burckmeyer*, *supra*, have been adopted in very explicit terms by this court in *Ellicott v. Martin*, 6 Md. 516.

Exclusive of the seventh reason, which has been abandoned, those which are relied upon in support of the defendant's prayer may be considered as assuming two propositions: 1. That there is no proof that the plaintiff was the holder of the note at the institution of the suit; 2. That the protest of the note in the name of the Penn Township Bank *per se* was evidence of such

a title to the note in the bank, that, notwithstanding the evidence in regard to the possession of the note by the plaintiff's attorney, when he ordered the writ, the suit could not be maintained in the name of the plaintiff.

To neither of these propositions can we yield our assent. We cannot adopt the first, because there is no evidence of *malâ fides*, no proof that any other person than the plaintiff claimed title to this note, either at the institution of the suit or subsequently; and there is certainly some evidence tending to prove the possession of the note by the plaintiff's attorney when the suit was commenced.

If a note indorsed in blank only is protested at the request of a bank, and suit is subsequently instituted thereon, in the name of a person then having possession of it, the name of the bank at no time having been indorsed upon the note, the protest is no more evidence that the actual ownership of the note, when protested, was in the bank, than that the bank was merely a collecting agent for the real owner; nor does it necessarily show that the party holding the note after the protest was not the holder and owner who placed it in bank for collection; consequently such a protest *per se* could not have the effect of defeating a *prima facie* right of action based upon possession. If so, the second proposition above stated, and having relation to the present protest, must be erroneous.

When the circumstances disclosed by the record are considered with reference to the principles announced in the last two cases which have been cited, we cannot entertain the opinion that the court below erred in refusing to grant the prayer of the defendants; and therefore the judgment will be affirmed.

Judgment affirmed.

POSSESSION OF NEGOTIABLE PROMISSORY NOTE INDORSED IN BLANK is *prima facie* evidence of title: See *Way v. Richardson*, 63 Am. Dec. 760, and note 762; *Petties v. Prout*, Id. 778, and note 779.

CAMPBELL v. LOWE.

[9 MARYLAND, 500.]

DEED CONVEYING TO TWO PARTIES AS TENANTS IN COMMON, certain real estate, cannot as against the purchaser at a sheriff's sale of the interest of one of the co-tenants, under a judgment recovered against him prior to the date of the deed, be shown to have been intended, as between the

grantee, to operate as a security by way of mortgage for a loan made to his co-tenant by the one whose interest was so sold.

PARTIES TO DEED CANNOT, IN CONTROVERSY WITH STRANGERS, maintain that the instrument does not express the intention of the parties.

PURCHASER AT JUDICIAL SALE IS SUBSTITUTED TO RIGHTS OF JUDGMENT CREDITOR under whose execution he purchased, and a disclaimer or conveyance by the judgment debtor, after the judgment became a lien on the property, will not affect his rights therein.

PRACTICE IN PARTITION SUIT, WHERE COMPLAINANT'S TITLE IS DENIED, is to retain the bill in the equity court until the title can be tried at law, but if the complainant has shown a legal title, and the defense is one cognizable only in equity, the equity court must entertain and decide the question of title.

COMPLAINANT IN PARTITION SUIT ON BILL AVERRING that the land was incapable of division, that defendant refused to divide or unite in a sale, and that it was for the interest and advantage of the parties to have the same sold, and praying for a sale and for general relief, on proof of his title as tenant in common, is entitled either to a decree for a sale or for a partition, according to the evidence; and in such case, a dismissal of the bill because there was no proof that a sale would be advantageous to the parties is erroneous, and the party is entitled to relief under the general prayer, notwithstanding the averment that defendant refused to divide the property was inappropriate, in view of the averment that it did not admit of partition, and the case made by the bill is not vitiated thereby.

EVERY TENANT IN COMMON IS ENTITLED TO SEPARATE ENJOYMENT OF HIS INTEREST in the property, either by a partition or by a sale and division of the proceeds, under the Maryland statutes, and though it does not appear that a sale would be for the advantage of the parties, partition may still be had as a matter of right, and it will not be refused on the ground of the difficulties or inconvenience attending it.

WHENEVER IT APPEARS THAT ACTION CANNOT BE DETERMINED ON ITS MERITS on the record on appeal, it must, under the Maryland act of 1832, be remanded for such further proceedings as the purposes of justice may require.

BILL in equity for a partition. The bill alleges that certain property, that in dispute here, was deeded to defendant and another as co-tenants; that the interest of defendant's co-tenant was sold on execution issued on a judgment against said party, rendered before making of said deed; that plaintiff was the purchaser at said sale; and prays for a sale of the property and division of the proceeds, and for general relief. The remaining facts appear in the opinion.

Joseph M. Palmer, for the appellant.

William P. Maulsby, for the appellee.

By Court, TUCK, J. We need not express an opinion upon the propriety of the court's refusal to remand the commission at the instance of the appellant, because, although we may be satis-

fied that the court could not have done otherwise than dismiss the bill of complainant, in the condition of the cause, as presented for final decree: *Harris v. Harris*, 6 Gill & J. 111; yet, if it appears that the case cannot be determined on its merits, or that the purposes of justice will be advanced by permitting further proceedings, it must be remanded under the act of 1832, c. 306, sec. 6: *Chaney v. Tipton*, 11 Id. 253; *Buchanan v. Torrance*, Id. 342.

The complainant, as we think, has established his claim, as tenant in common with the defendant, to an undivided moiety of the property in question, by a title paramount to the defense set up in her answer, conceding that defense to have been fully sustained by the evidence. The judgment under which he purchased William Lowe's interest in the property was obtained before the deed from Reich and wife to his sister and himself, and fastened itself as a lien upon his interest *eo instanti* his title accrued as tenant in common under that conveyance.

To relieve herself from this view of the case, as presented by the documentary evidence, the appellee insists that the property was wholly hers at that time, because she purchased and paid for it, and that the deed was executed to her and her brother, under the impression on their part that it would operate as a security, by way of mortgage, for a loan which he had made to her. It is not pretended that the deed is not in the form in which the grantees designed it to be, but they insist that they then supposed it would have the effect now imputed to it; that is to say, an effect that the law, as we think, does not allow. Now, whatever a court of equity might be authorized to do with this instrument, if the defendant were seeking to have it reformed as against William Lowe, we must deal with it as a case involving the rights of strangers to the transaction, and in that aspect of the case we are relieved from the necessity of passing upon the testimony offered to explain what the deed was intended to be. The defendant cannot, in a controversy with strangers, insist that the deed does not express what it was designed to express. She must abide by its construction and legal effect: *Henderson v. Mayhew*, 2 Gill, 409 [41 Am. Dec. 434]; *Alderson v. Ames*, 6 Md. 52; *Anderson v. Tydings*, 8 Id. 427; *Hunt v. Rousmaniere's Adm'r*, 1 Pet. 1. The appellant, at a judicial sale, purchased the interest of William Lowe in this property, in reliance, as we must suppose, upon Reich's deed to him and his sister. He was substituted by law to the rights of the judgment creditor, under whose execution he made the pur-

chase: *Spindler v. Atkinson*, 3 Md. 423 [56 Am. Dec. 755]; and cannot be affected by the disclaimer of title made by William Lowe, or by the deed from him to his sister, executed after the judgment became a lien on the property: *Anderson v. Tydings*, *supra*. If the deed could be reformed, as between the defendant and William Lowe, or made to operate differently from the legal import of its terms, to the prejudice of this appellant, by the introduction of matters *in pais*, contemporaneous with or subsequent to the execution of the instrument, our registry acts would afford little protection to purchasers.

The defendant denies the title of the complainant to any interest in the property. Generally, in such cases, the practice is to retain the bill until the right can be tried at law: *Boone v. Boone*, 3 Md. Ch. Dec. 497; *Wilkin v. Wilkin*, 1 Johns. Ch. 111; as in cases of dower: *Wells v. Beall*, 2 Gill & J. 468. But as the point is to be determined, in this case, upon principles of equity—the complainant having shown a legal title, and the defendant relying upon a defense cognizable only in a court of equity—if the court in which the partition is sought does not entertain the question of title, the defendant would be deprived of the benefit of her defense altogether, for none such as that here relied on could be made at law, even if the case were between the parties to the deed, and did not affect a stranger: *Cartwright v. Pultney*, 2 Atk. 380.

The remaining question is whether the case can be remanded under the act of 1832, c. 302, sec. 6. The argument on the part of the appellee is that inasmuch as there is no evidence that a sale would be advantageous to the parties, and as the bill cannot be amended so as to demand partition, or a sale, there is nothing by which the court can ascertain that the substantial merits of the case will not be determined by affirming the decree. If, as we have said, the complainant has established his claim to an undivided interest as tenant in common with the defendant, he is entitled to enjoyment of that interest, either by partition: *Parker v. Gerard*, 2 Amb. 236; 1 Story's Eq. Jur., sec. 653; or by a sale and division of the proceeds under our acts of assembly: *Corser v. Polk*, 1 Bland, 236; 2 White & Tudor's Lead. Cas. Eq. 329. He has presented his case in the latter aspect, alleging that the property cannot be divided, and that it would be for the advantage of the parties to have the same sold for a division, and this averment is not denied in the answer. The prayer is for a sale, and for general relief.

The acts of 1785, c. 72, sec. 12, and 1831, c. 311, sec. 7, author-

ize the sale of property held in common, where the interest of all the parties requires that mode of partition. But these acts must be construed in connection with the law as it stood before their passage, and where that fact does not appear, partition may still be made, as matter of right to the party, and courts of equity will not refuse it, on account of the inconvenience or difficulties attending the partition: *Agar v. Fairfax*, 2 White & Tudor's Lead. Cas. Eq. 351. These acts give a new remedy, in order to promote the interest of the parties, but the object in view—separate enjoyment—is the same, whether the bill be filed for partition merely, or in the alternative; though to give the court jurisdiction under the acts of assembly, it must be averred that a sale would be to the advantage of the parties: *Tomlinson v. McKaig*, 5 Gill, 256. Suppose that in this case proof had been taken and the court had been satisfied that the interest of the parties did not require a sale, would there have been any reason or justice in dismissing the bill and subjecting the parties to the cost of another proceeding, for partition in the ordinary way, on the assumption that such relief would be inconsistent with the object of the bill? Why not, in such a case, if the court were satisfied of the complainant's right to partition, allow him the benefit of his proceeding, by ordering a commission for that purpose? The error in the argument of the appellee's counsel is this, that it treats this bill as seeking to obtain one of two inconsistent alternative objects, whereas the design of the proceeding is to obtain partition of this common property, in one of two modes allowed by the law, according to the situation of the property and circumstances of the case. It is within the doctrine applicable to the uses of the general prayer. In *Tomlinson v. McKaig*, *supra*, a bill was filed under the act to direct descents, in which it was averred that the land would not admit of advantageous division, and a sale was prayed. There was also a prayer for general relief, and such other proceedings as might be necessary. The court held that "the complainants were entitled, under the frame of the bill and the prayers, to such action of the court as the case made in the bill would by law entitle them to; that it was not material to the case that the bill assumed that the land was incapable of division, and that there was a specific prayer for the appointment of a trustee to sell the lands; that the one might have been an inappropriate averment, and the other an inappropriate prayer for such a case; but they would not vitiate averments conferring jurisdiction, or affect a prayer for general relief, which always justifies the ultimate action of the court thereupon, in pursuance of the case made by

the bill." In this case the appellant states his title; that the property will not admit of partition; that a sale would be advantageous to both parties; that the defendant refuses to divide the property, or to unite in making a sale. The averment that the lots did not admit of partition may have been inappropriate, in view of the statement that the defendant had refused to divide the property; but, as in the case cited, such a statement ought not to vitiate the case made by the bill, or affect the complainant's right to be relieved by partition under the general prayer.

We are aware that the provisions of the act to direct descents are not the same as those of the acts of 1785 and 1831; but the object is the same in both; that is, to obtain separate enjoyment of joint property. Now, under the descent laws it is clear that the complainant need only show his title and his right to have the property divided, and if it cannot be divided with advantage to the parties, he will be entitled to have it sold for division: *Chaney v. Tipton*, 11 Gill & J. 253. When the doctrines of the common law relating to partition, and the acts of assembly on that subject, are considered together, they do not so far differ from those regulating descents as to deny to a tenant in common substantially the same course of proceeding in obtaining partition as are enjoyed by parceners. It is sufficient, in order to have relief under the act of 1831, to show that the complainant is entitled to have partition of the property, that the defendant has refused to make partition, and that it would be for the interest and advantage of the parties to have the same sold for distribution of the proceeds. A bill thus framed, with a prayer for specific relief by a sale, and one for general relief, would authorize the court to decree a sale or a partition, according to the evidence.

The object of this bill is to have separate enjoyment of the respective interests of the parties. We have seen that the complainant is entitled to relief in one of two modes, and as the substantial merits of the case cannot be determined on this record, it must be remanded under the act of 1832, c. 302, when the parties will have an opportunity of taking such other proceedings by pleadings or proofs as the purposes of justice may require.

Decree reversed and cause remanded.

PURCHASER AT EXECUTION SALE, RIGHT OF, TO SUBROGATION TO CREDITOR'S RIGHTS: See *Howard v. North*, 51 Am. Dec. 769.

PARTITION, WHEN DECREED, AND PROCEEDINGS WHEN TITLE IS DENIED: See *Howey v. Goings*, 54 Am. Dec. 427, note 431; *Rutherford v. Jones*, 60 Id. 865, note 660.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

KENNEY v. McLAUGHLIN.

[5 GRAY, 2.]

REPETITION OF SLANDEROUS REPORT ALREADY IN CIRCULATION IS ACTIONABLE, although it was not repeated with any design to extend its circulation, or confirm it, or cause the person to whom addressed to believe it to be true.

ACTION of tort for slander by the defendant, Mrs. McLaughlin. A witness for the plaintiff testified that the defendant had asked her "if she had heard the story;" to which the witness replied, "What story?" The defendant answered, "Nothing less than that Agnes is Mr. Moran's kept miss." The witness stated that she did not believe it, whereupon the defendant said, "It is all over the glass-house." The witness then said, "That could not be, or her husband would have heard of it, who worked in the glass-house;" to which the defendant replied, "It is not in the upper, but the lower, glass-house." The witness further testified that she did not believe the story, or think any worse of the plaintiff for having heard it. The defendant offered to show that the reports of which she spoke were current in the community before the conversation given above, and this evidence was admitted, under the plaintiff's exceptions. The jury were instructed that if the defendant repeated a story defamatory of the plaintiff, conveying to any extent the idea that it was true, or that she believed it to be true, it would be a slander; but that if the defendant merely said there was a story in circulation of the kind set forth in the writ, and did not say so with any design to extend its circulation, or in any degree to cause the person whom she addressed to believe or suspect the charge

which the story imputed to be true, or to add to it any sanction or authority of her own, or to give it any further circulation or credit, and it was true that such a story was in circulation, it would not be actionable to say so. The plaintiff excepted to this instruction. The jury found a verdict for the plaintiff of seven dollars and twenty-nine cents. Plaintiff appealed.

T. D. Eliot, for the plaintiff.

G. Marston, for the defendant.

By Court, THOMAS, J. That an action of slander lies for charging the plaintiff with the crime of fornication is well settled: *Miller v. Parish*, 8 Pick. 384. It is a charge of a crime punishable by law, and of a character to degrade and disgrace the plaintiff and exclude her from society. That the words uttered import the commission of the offense cannot be doubted.

The uttering of the words is a wrongful act, purposely done; and this is sufficient to constitute legal malice. To prove legal malice, it is not necessary to show that the words were uttered from personal enmity or ill-will. When the words are uttered, the true measure of damages is the injury caused by the utterance. The "story" uttered or repeated by the defendant contains a charge against the plaintiff of a nature to destroy her reputation. It was a false charge. It is no answer in any forum to say that she only repeated the story as she heard it. If the story was false and slanderous, she must repeat it at her peril. There is safety in no other rule. Often the origin of the slander cannot be traced. If it were, possibly it might be harmless. He who gives it circulation gives it its power of mischief. It is the successive repetitions that do the work. A falsehood often repeated gets to be believed.

We think the instructions of the learned judge were not in conformity to the law as understood in this commonwealth: *Wolcott v. Hall*, 6 Mass. 514 [4 Am. Dec. 173]; *Alderman v. French*, 1 Pick. 18 [11 Am. Dec. 114]; *Bodwell v. Osgood*, 3 Id. 379 [15 Am. Dec. 228]; *Commonwealth v. Snelling*, 15 Id. 337; *Stone v. Varney*, 7 Met. 91 [39 Am. Dec. 762]; *Watson v. Moore*, 2 Cush. 133. The jury were instructed that if the defendant merely said there was a report in circulation of the kind set forth in the writ, and did not say so with any design to extend its circulation, or in any degree to cause the person whom she addressed to believe or suspect the charge which the story imputed to be true, or to add to it any sanction or authority of her own, or to give it any further circulation or credit, and it was true

that such story was in circulation, it would not be actionable to say so.

It seems scarcely possible that a story could be repeated by a person of any respectability under the circumstances and with the results supposed. To say that such a story is current, and to relate it to one before that time ignorant of its existence, necessarily gives it further circulation; and a party is presumed to know and intend the necessary consequences of his acts.

And such is the case before us. The witness had never heard of the story, and expresses her disbelief of it. The defendant, so far from expressing a concurrence in the witness's disbelief, replies: "It [the story] is all over the glass-house." And when the witness says this could not be, or her husband, who worked at the glass-house, would have heard it, the defendant replied: "It was not in the upper, but the lower, glass-house."

The story is related to one before ignorant of it, without giving the person from whom it was received, without expressing any disbelief of it, without any apparent purpose of inquiry as to its truth, and with the assertion in reply to the disbelief of the witness of the currency of the report.

It seems to us that the jury, treating the instructions as applicable to the case before them, may have been misled; that they may have understood the learned judge to mean that the simple repetition of a slanderous story, without express malice, was not actionable.

But under the limitations stated, if they were possible, we think the rule laid down is not the law. A man cannot say that there is a story in circulation that A poisoned his wife, or B picked O's pocket in the omnibus, or that D has committed adultery, and relate the story, and when called upon to answer, say: "There was such a story in circulation; I but repeated what I heard, and had no design to circulate it or confirm it;" and for two very plain reasons: that the repetition of the story must, in the nature of things, give it currency; and the repetition, without the expression of disbelief, will confirm it.

The danger is an obvious one, and long since pointed out; and it is that bad men may give currency to slanderous reports, and then find in that currency their own protection from the just consequences of a repetition.

Although the jury, under these instructions, returned a verdict for the plaintiff, yet from the damages returned we cannot but believe the instructions of the learned judge, which we

think incorrect, must have prejudiced the plaintiff's cause, and that justice requires she should have a new trial.

Exceptions sustained.

REPETITION OF SLANDER ALREADY IN CIRCULATION RENDERS ONE LIABLE THEREFOR: *Hersh v. Ringwalt*, 2 Am. Dec. 392; *Wolcott v. Hall*, 4 Id. 173; *Colloway v. Middleton*, 12 Id. 409; *Anthony v. Stephens*, 13 Id. 497; *Miller v. Kerr*, Id. 722; *Evans v. Smith*, 17 Id. 74; *Waters v. Jones*, 29 Id. 261; but if he mentions the author's name, and repeats the slander in the same words, he is not liable: *Hersh v. Ringwalt*, *supra*; *Miller v. Kerr*, *supra*; *Tallow v. Jaquett*, 26 Id. 399. Whether evidence of prior reports charging the commission of the same offense are admissible in mitigation of damages, see *Sanders v. Johnson*, 36 Id. 564, and prior cases in note; *Wetherbee v. Marsh*, 51 Id. 244. The principal case is cited in *Peterson v. Morgan*, 116 Mass. 352, to the point that in an action of slander for repeating defamatory words, evidence that rumors charging the plaintiff with the same offense previously prevailed in the vicinity is not admissible either in bar or in mitigation of damages.

FISH v. THOMAS.

[5 GRAY, 45.]

AGREEMENT TO FORBEAR TO ENFORCE LIEN IN ADMIRALTY IS SUFFICIENT CONSIDERATION for a promise by one of the owners of the ship to pay the claim should a libel then about to be brought against the ship on a similar claim be sustained.

VERBAL PROMISE BY ONE OF OWNERS OF SHIP TO PAY CLAIM FOR LABOR AND MATERIALS furnished in her construction to the builder, provided a libel then about to be brought on a similar claim should be sustained in admiralty, is not a promise to answer for the debt of another, within the statute of frauds.

DEFENDANT IS ESTOPPED FROM DENYING THAT PLAINTIFFS HAD LIEN ON SHIP, where the parties agreed that they should abide the decision of a court of competent jurisdiction in a case then pending which established a similar claim.

ACTION of contract. The case was tried in this court, and reserved for the opinion of the whole court, upon the pleadings and certain evidence, to appear hereafter, introduced by the plaintiffs. The declaration alleged that the plaintiffs furnished certain labor and materials for the construction of a ship, and that they were about to libel her to enforce a lien upon her for the value of the labor and materials, when the defendant, who was the agent and one of the owners of the ship, in consideration that the plaintiffs would refrain from so doing, promised to pay them the amount of their claim, provided a libel then about to be brought by one Atsatt, on a similar claim, should

be sustained in admiralty. There were also allegations to the effect that the plaintiffs refrained from libeling the ship; that Atsatt's libel was sustained; and that the defendant had refused to pay the plaintiffs' claim. The answer denied that the plaintiffs ever had any lien upon the ship, and alleged that the defendant's contract for building the ship was with one Barstow, who was fully paid therefor, and that the agreement alleged by the plaintiffs was not in writing, and was without consideration. Barstow testified that he had built the ship; that the plaintiffs had furnished him with lumber and had made out their bill solely to him; and that he had been fully paid before the ship was libeled and before his own insolvency. Handy, a former clerk of the plaintiffs, testified that upon receiving instructions from them to obtain payment of their account, or some satisfactory arrangement of it, or to have the ship libeled, he called upon the defendant, who stated that he wished to save expense, and did not see the need of more than one libel, and that if Atsatt's libel should be sustained he would pay the plaintiffs' claim. The witness then told the defendant that with this understanding he would leave the bill, and the plaintiffs would look to the defendant to do as he had agreed. The witness left the bill and reported the matter to the plaintiffs, who consented to the arrangement, and took no further steps towards libeling the ship. It was admitted that the defendant was agent and one of the owners of the ship, and that Atsatt's libel was sustained and his claim paid.

A. Borden, for the plaintiffs.

B. C. Pūman, for the defendant.

By Court, SHAW, C. J. As the parties have left the case upon the testimony of Handy and the facts agreed, the court are of opinion that the plaintiffs are entitled to recover. The plaintiffs claimed to have a lien on the defendant's vessel, with the existing means of enforcing it by an admiralty process. Their agreement to forbear to attempt to enforce that lien was a good consideration for the defendant's promise to pay if that suit should be decided in favor of a party having a similar claim.

If it was not the defendant's own debt, capable of being enforced by a personal suit against him, it was a debt for which the defendants property stood hypothecated; his obvious purpose was to get a release of his own property without additional expense. It was a consideration moving directly from the plaintiffs to the defendant. It was not a promise to pay the debt of

another in the sense of the statute of frauds; it was a promise to pay a debt for which his property was responsible, and which was therefore his debt *sub modo*.

The defendant is estopped from denying that the plaintiffs had a lien; that was alleged on one side and denied on the other, and was the very subject of controversy; the parties agreed that it should abide the decision of a court of competent jurisdiction in a case then pending; it was decided in favor of the plaintiffs, and the defendant is bound by it.

Judgment for the plaintiffs.

FORBEARANCE TO SUE, AS CONSIDERATION OF PROMISE: See *Prater v. Miller*, 60 Am. Dec. 521, and note.

PROMISE IS NOT WITHIN STATUTE OF FRAUDS, as being a promise to answer for the debt or default of another, if the debt can be considered the promisor's own: See *Harrison v. Sawtel*, 6 Am. Dec. 337; *Underhill v. Gibson*, 9 Id. 82; *Rogers v. Collier*, 23 Id. 153; *Rhodes v. Lee*, 24 Id. 744; *Corbett v. Cockram*, 30 Id. 348; *Jones v. Hardesty*, 32 Id. 180; *Proprietors v. Abbott*, 40 Id. 184; *Wainwright v. Straw*, Id. 675; *Barker v. Bucklin*, 43 Id. 728, and note; *Tindal v. Touchberry*, 49 Id. 637; *Beaman v. Russell*, Id. 775; *Wallace v. Wortham*, 57 Id. 197; *Rand v. Mather*, 59 Id. 131. So where taxes on real estate are assessed to the former owner, a promise to the collector by the present owner of a portion, that if the collector would procure the apportionment of the taxes, so that the owner would know how much belonged to his portion of the land, he would pay the same, is an original promise: *Burr v. Wilcox*, 13 Allen, 273. The Massachusetts authorities have gone no further than to decide that a case is not within the statute, where upon the whole transaction the fair inference is that the leading purpose and effect of the transaction was the acquisition by the promisor from the promisee of some property, lien, or benefit, which he did not before possess, but which inured to him by reason of his promise, so that the debt may fairly be deemed his own: *Ames v. Foster*, 106 Mass. 403. And the statute applies only to promises made to the person to whom another is answerable: *Green v. Brookins*, 23 Mich. 53. The "special promise to answer for the debt, etc., of another," in order to fall within the statute, must be an express promise, for which the promisor's person or estate is not already liable, to answer for the debt, etc., of another than either of the parties to the promise, and who, if already liable for the debt, continues so liable: *Furbish v. Goodnow*, 98 Mass. 297. In all the foregoing, except the American decisions, the principal case was cited.

COMMONWEALTH v. WILDE.

[5 GRAY, 83.]

CONVICTION OF LARCENY IS WARRANTED ON PROOF that the defendant went into a shop and asked to buy the chattel, but was referred by the clerk to the owner, who refused to sell it to him except upon his father's order, which was not obtained, and thereafter the defendant asked the clerk to be shown the chattel, which he took and carried away, saying to the clerk that he had made it all right with the owner.

INDICTMENT for larceny of a pair of pantaloons. The defendant went into the shop of Brown & Crossman, and asked the clerk if he could get a pair of pantaloons. The clerk referred him to Crossman, who was in the back shop, but the latter told the defendant that he would not let him have the pantaloons except upon his father's order. The defendant then went out of the shop, but returned in a short time without having obtained the order, and asked the clerk to show him the pantaloons. While the clerk was attending to another customer, the defendant took the pantaloons, folded them up, and put them under his coat, and went out, saying to the clerk that he had made it all right with Crossman. The clerk therefore made no objection to the defendant's taking the pantaloons. The jury were instructed that if they believed the evidence, it was sufficient to warrant a verdict of guilty. The defendant was convicted, and the judge reported the case to this court.

C. I. Reed, for the defendant.

J. H. Clifford, attorney general, for the commonwealth.

By Court, **DEWEY, J.** The case, as presented in the report of the evidence, well warranted a verdict of larceny against the defendant. Upon the facts shown, there was no intention on the part of the owner of this property to part with his property; nor was there any actual transfer by anybody. The clerk in the shop had referred the defendant to Crossman, the owner, and the owner had directly refused to sell him the pantaloons except upon his father's order, which was not obtained. At the second interview the article was not sold to him by the clerk, nor delivered to him as a vendee, nor was he for a moment vested with the right of possession of it, as against Crossman. Nothing then occurred to show any such intended sale. The defendant feloniously took possession of the article and carried it away. His falsely saying that he had made it right with Crossman, and thus preventing the clerk from interfering with his actually carrying into effect the removal from the shop of goods which he then had in his possession without right or authority, will not make the case less one of larceny: *Regina v. Robins*, 6 Cox C. C. 420.

Exceptions overruled.

LARCENY, WHEN DEFENDANT IS GUILTY OF: See *State v. Homes*, 57 Am. Dec. 269, and exhaustive note; *State v. Lindenthall*, Id. 743, and note. If an owner puts his property into the hands of another, to use it or do some act in relation to it, in his presence, he does not part with the possession, and

the conversion of it, *animo furandi*, is larceny: *Commonwealth v. O'Malley*, 97 Mass. 587; but where he voluntarily parts with possession for the purpose and with the intention of parting with the title, without any expectation of the chattel being returned, though he may have been induced thereto by the fraud of the person to whom the possession and title have been transferred, there is no larceny: *Perkins v. State*, 65 Ind. 321, both citing the principal case.

COMMONWEALTH v. HUTTON.

[5 GRAY, 88.]

COMPLAINT IS INSUFFICIENT IF IT CHARGES COMMISSION OF OFFENSE "on the third day of June instant," without mention of the year, although it purports to be sworn to "on the fourth day of June, A. D. 1855."

COMPLAINT charging the defendant with unlawfully selling intoxicating liquor "on the third day of June instant." The following certificate, signed by the clerk of the police court, was at the foot of the complaint: "Received and sworn to on the fourth day of June, A. D. 1855, before said court." The defendant, after a verdict of guilty, moved in arrest of judgment, on the ground that the time of the commission of the offense was not stated in the complaint with sufficient certainty. The motion was overruled, and the defendant appealed to this court.

J. H. Clifford, attorney general, for the commonwealth.

E. L. Barney, for the defendant.

By Court, METCALF, J. An indictment is insufficient to support a judgment unless it precisely shows a certain year and day when the offense alleged therein was committed. The same is true of a complaint made to a magistrate who has authority on a trial thereof to pass sentence on the defendant. Does this complaint show a certain year and day when the defendant unlawfully sold intoxicating liquor? It alleges that he did so on "the third day of June instant," without mention of the year. This, standing alone, is admitted by the counsel for the commonwealth to be clearly insufficient. But it is suggested that the entry at the foot of the complaint, that it was "received and sworn to on the fourth day of June, A. D. 1855," sufficiently shows that the day mentioned in the complaint is the next preceding day, to wit, the third day of June, 1855. It is extremely probable that by "June instant" June, 1855, was intended. But we think we cannot infer with any more legal certainty that the complaint was drawn up in June, 1855, merely because it was sworn to in

that month, than we could infer, if it had been sworn to in July or August, 1855, that "June instant" was the next preceding June. The complaint may, for aught that we can know, have been prepared in June, 1854, and not sworn to till the following year.

There are cases under the bastardy process in which defects somewhat like that in the present case were held not to be fatal: *Marston v. Jenness*, 12 N. H. 137; *Tilson v. Bowley*, 8 Greenl. 163. But we find no precedent in a case of criminal process for sustaining a judgment on this complaint.

As was once said by Lord Denman: "On the first impression we always feel desirous to get over objections of this kind if we can; but we must abide by established rules. The objection is one which we cannot avoid giving effect to. We shall thus induce more accuracy in future." *Regina v. Blocham*, 6 Ad. & El., N. S., 633.

Judgment arrested.

INDICTMENT MUST STATE TIME WITH CERTAINTY: *Cook v. State*, 56 Am. Dec. 410, and prior cases in note; *Nicholson v. State*, 54 Id. 168; *State v. Thurston*, 58 Id. 695. A complaint charging an offense "on the fourteenth day of December, in the year one thousand eight hundred and fifty-eight," is not fatally defective by reason of omitting "of our Lord:" *Commonwealth v. Doran*, 14 Gray, 38, distinguishing the principal case as merely deciding that a complaint charging the offense "on the third day of June instant" did not sufficiently allege the time; and *Commonwealth v. McLoon*, *post*, p. 354, as holding that an allegation that the offense was committed "on the fifteenth day of July, 1855," was defective. So under a complaint dated "August 30, 1865," charging the commission of a continuing offense "on the first day of June, in the year of our Lord one thousand eight hundred and sixty-five, and from that day to the day of the date of this complaint," evidence may be introduced covering the whole time between the first day of June and the date of the complaint: *Commonwealth v. Walton*, 11 Allen, 240, distinguishing *Commonwealth v. McLoon*, *post*, p. 354, in that the omission of the words "in the year," or the letters "A. D.," without which the figures "1855" were held insufficient to denote the year, was in the body of the complaint, and the principal case in that in it the complaint contained no allegation of time except "the third day of June instant."

THE PRINCIPAL CASE IS CITED in *Maloney v. Piper*, 105 Mass. 234, to the point that a civil action is not governed by the peculiarly strict rules of criminal proceedings; and referred to in *Commonwealth v. Keefe*, 7 Gray, 337, on the point that it is the uniform practice in *jurats* to state the year in figures, and a *jurat* is not objectionable for so doing.

COMMONWEALTH v. McLOON.

[5 GRAY, 91.]

COMPLAINT IS INSUFFICIENT IF IT CHARGES COMMISSION OF OFFENSE "on the fifteenth day of July, 1855," omitting the letters "A. D."

COMPLAINT charging the defendant with unlawfully selling intoxicating liquors "on the fifteenth day of July, 1855." The defendant, having been convicted, moved in arrest of judgment, on the ground that the time of the commission of the offense was not alleged in the complaint with sufficient certainty. The motion was overruled.

J. H. Clifford, attorney general, for the commonwealth.

E. H. Bennett, for the defendant.

By Court, MERRICK, J. The time of the commission of an alleged offense ought always to be distinctly stated in a complaint or indictment charging a party with having committed it. And it should be set forth with such a degree of accuracy and precision that upon a consideration merely of the facts averred no doubt could be entertained as to the period really intended: Archb. Crim. Pl., 5th Am. ed., 37; 1 Ch. Cr. L. 217; Com. Dig., Indictment, G, 2. This rule in criminal pleading, which is uniformly laid down in all the elementary treatises upon the subject as imperative, is sanctioned by the decisions of this court in cases in which it has been recognized and enforced: *Commonwealth v. Griffin*, 3 Cush. 523; *Commonwealth v. Adams*, 1 Gray, 481. The rule itself does not appear to have been anywhere doubted; but questions have sometimes arisen in relation to its observance, and whether particular averments conformed to its requisitions. Thus it has sometimes been said by judges, and determined by courts, that it is insufficient to describe the time by the use of numeral letters or figures, but that it must be expressed in words written out at full length: *Berrian v. State*, 22 N. J. L. 9.

But upon that question we do not think it necessary to indicate any definite opinion; because, although the indictment against the defendant does not wholly describe in words the time of the commission of the offense imputed to him, its averments, after giving full force to the meaning and signification of the figures made use of, are still obviously incomplete and defective. The figures "1855" are not accompanied by any words or letters qualifying or expressing their meaning, or indicating the particular era to which they refer. If it should be said

that, notwithstanding this omission, it is not difficult to conjecture truly what was the time intended by the pleader who drew the complaint, the answer is that this is not enough. The rule of law must be complied with; it does not allow anything to be left to conjecture. What was intended should have been intelligibly and unambiguously expressed. Forms and technical rules may seem sometimes to be unnecessarily strict, but it should be remembered that they were devised as a reasonable security to an individual subject or party, in his contest with the state, when arraigned upon a criminal accusation. They ought not, therefore, to be lightly disregarded or negligently relaxed. To make the allegation of time in the indictment against the defendant sufficient, there should at all events have been words, or at least letters, which have acquired an established use in the English language, so added to or connected with the figures contained in it as to describe or indicate with certainty the era to which it was intended that they should refer: *Commonwealth v. Curk*, 4 Cush. 596. For the want of such words, or letters of description and explanation, the time of the commission of the alleged offense cannot be considered as having been substantially or formally set out in the indictment; and for that reason it must be held to be erroneous, and insufficient to support a conviction.

Judgment arrested.

INDICTMENT MUST STATE TIME WITH CERTAINTY: See *Commonwealth v. Hutton*, ante, p. 352, and note 353, where cases are given in which this case and the principal case, cited together, have been distinguished. The words "of our Lord" may be omitted, it has been held, after the word "year" in an indictment: *Engleman v. State*, 52 Am. Dec. 494; and a like decision was made in *Commonwealth v. Doran*, 14 Gray, 38, in which the principal case was attempted to be distinguished. The principal case was approved in *Wells v. Commonwealth*, 12 Id. 328, on the point that where an indictment charged the keeping and maintaining of a house of ill-fame "on the first day of December, in the year eighteen hundred and fifty-seven, and on divers other days and times between said first day of December and the first day of June, eighteen hundred and fifty-eight," omitting the words "in the year," the allegation as to divers other days is defective; and in *Commonwealth v. Keefe*, 7 Id. 336, the principal case is referred to on the point that it would be unnecessary to decide whether stating the date in figures in a *jurat* would be sufficient in a complaint for a criminal offense: the precision required in an indictment or complaint is not necessary in a *jurat*.

ELA v. SMITH.

[5 GRAY, 121.]

DETERMINATION OF MAYOR THAT RIOT OR MOB IS THREATENED IS CONCLUSIVE THAT OCCASION EXISTS which authorizes him, under Massachusetts statutes of 1840, c. 92, to call out the volunteer militia to aid the civil authority in suppressing violence and supporting the laws; and the question cannot be inquired into in an action for personal injuries inflicted by the militia.

CIVIL OFFICER INCURS NO LIABILITY IN ISSUING PRECEPT BY WHICH MILITIA IS CALLED OUT, when he is vested with the power of determining whether an occasion exists therefor, and his determination has been rightly exercised within the limits of the authority conferred by law.

PRECEPT OF CIVIL OFFICER CALLING OUT MILITIA AFFORDS COMPLETE JUSTIFICATION to all those bound to obey its command, for acts done by them in pursuance thereof, when issued within the limits of the authority conferred by law, and in exact conformity to the terms of the statute.

AUTHORITY TO CALL OUT MILITIA FOR PARTICULAR PURPOSE CARRIES WITH IT, by necessary and reasonable implication, the authority to employ them to effect that object, and to issue all proper orders and use all reasonable means therefor.

MAYOR HAS AUTHORITY TO ORDER VOLUNTEER MILITIA CALLED OUT BY HIM, under Massachusetts statutes of 1840, c. 92, to repair from the place assembled to any designated portion of the city and there perform any specific duty in suppressing violence and supporting the laws.

MILITIA HAS NO POWER TO ACT INDEPENDENTLY OF CIVIL AUTHORITY, under Massachusetts statutes of 1840, c. 92, when assembled under a precept of a civil officer to aid in suppressing violence and supporting the laws; nor can such officer delegate his authority to the military authorities, or vest in them discretionary power to take any steps or do any act to prevent or suppress a mob or riot.

POWER TO CALL OUT MILITIA TO REPRESS AND PREVENT ANTICIPATED RIOT CANNOT BE MADE TO DEPEND, in any degree, upon the cause of such threatened disturbance: the cause may be the enforcement of an unconstitutional law.

UNITED STATES MARSHAL DOES NOT RENDER HIMSELF LIABLE FOR ACTS DONE BY MILITIA by requesting that they be called out to prevent a riot from the service of process of the United States, which he intended to execute and did execute without such military aid, and by giving assurances that the expenses incurred by calling out the militia would be paid by the president of the United States.

OFFICERS ARE NOT LIABLE FOR UNLAWFUL ACTS OF MILITIA, done without authority, and not coming within the fair scope of the orders given by them.

ACTION OF TORT FOR ASSAULT AND BATTERY AND FALSE IMPRISONMENT, against Jerome V. C. Smith, mayor of Boston, Benjamin F. Edmands, major-general of the first division of the Massachusetts volunteer militia, Thomas H. Evans, captain of a company

of that division, and Watson Freeman, United States marshal for the district of Massachusetts. Smith alleged that, apprehending a riot, he issued a precept and gave orders to Edmands to aid the police in keeping the peace of the city; Edmands, that he acted under such precept and orders; Evans, that he acted under orders of Edmands; and Freeman, that he acted as marshal, under the act of congress, in removing a fugitive from service to the state whence he fled. It appeared on the trial that Anthony Burns was arrested as a fugitive from service, in Boston, May 24, 1854, by the United States marshal, and brought before a commissioner of the United States from time to time until June 2d, when the commissioner decided that Burns should be delivered to the claimant, and made a certificate authorizing the removal of Burns to Virginia. Burns was confined in the court-house, with the assistance of a body of United States troops, during the examination, and while he was in custody, Mayor Smith, on May 27th, issued orders to General Edmands, reciting a threatened riot, and commanding him to cause a certain body of militia, armed and equipped, to parade at their respective armories. A day or two afterwards the United States marshal and district attorney called upon the mayor, and also sent him letters, stating that the military force on duty was inadequate, and requested him to call out a sufficient body of men to insure the peace of the city, and assured him that the expenses incurred would be paid by the president, but at the same time declaring that the United States government did not wish to ask any assistance from the city to execute its laws. Accordingly, on May 31st the mayor issued to General Edmands another precept, commanding him to cause a larger body of the militia to parade on Boston common at a certain hour on June 2d, and then and there to obey such orders as might be given him. On June 2d the mayor gave such directions, verbal and written, as he thought would best tend to preserve the peace of the city, and it was agreed between him and Edmands that the latter should dispose of his troops so as to aid the police on receiving notice from the mayor of the hour at which the marshal would move his posse. On the same day the mayor issued the following proclamation to the citizens, a copy of which was sent to Edmands: "To secure order throughout the city this day, Major-General Edmands and the chief of police will make such disposition of the respective forces under their commands as will best promote that important object; and they are clothed with full discretionary powers to sustain the laws of the land."

General Edmands afterwards marched his troops from the common to Court square, and then so disposed of them, in conjunction with the police, as to clear and guard the streets along which the marshal was to march with his posse. The mayor gave some verbal orders as to the disposition of the troops. The plaintiff, after Burns had been taken past, attempted to walk along one of the guarded streets, but he was pushed back and knocked down by the soldiers, and cut over the head by an officer, and was then taken away by the police. The counsel for the mayor and the two officers moved for a nonsuit at the close of the plaintiff's case, and the counsel for the marshal moved that the jury be instructed that the plaintiff was not entitled to recover, but the judge reported the evidence for the consideration of the whole court.

C. M. Ellis and J. P. Hale, for the plaintiff.

R. Choate and G. S. Hillard, for Smith, Edmands, and Evans.

B. F. Hallett, for Freeman.

By Court, BIGELOW, J. This case presents for the first time to the consideration of the court questions of great interest and importance, arising on the true construction and practical operation of those provisions of the statutes by which authority is given to certain civil officers to call out the organized militia of the commonwealth to aid in preserving the public peace and enforcing the laws. It is obvious that the nature of the case necessarily leads to an inquiry into the powers and duties of magistrates in the exercise of some of their highest functions, and to a determination of the rights and obligations of citizens when put to the severest test to which they can be subjected in a well-ordered and law-abiding community. It was therefore a wise act of judicial discretion in the judge who presided at the trial to withdraw the case from the consideration of the jury, in order that the legal principles applicable to the facts proved might be first deliberately settled and adjudicated. By such a course, the rights of all parties were preserved, and in the event of another trial, an intelligent, safe, and impartial verdict rendered more certain.

The provisions of law on which the defendants Smith, Edmands, and Evans rely for a justification of the acts of trespass alleged in the plaintiff's writ are found in Stats. 1840, c. 92, establishing the volunteer militia: Secs. 27-29. These are reenactments of the revised statutes, c. 12, secs. 134-136, with the addition of mayors of cities to the list of civil officers by

whom an armed force may be called out; and are intended to prescribe the same mode of calling out the "volunteer militia" in aid of the civil authority as was provided in the revised statutes for calling out, in like case, a portion of the entire organized militia of the state. The aspect in which this case is presented renders it unnecessary to consider in detail the provisions of the revised statutes, c. 129, sec. 5, which are applicable only where a tumult or riot actually exists, and a military force, having been duly called out, is employed in suppressing or dispersing it. Such was not the case here. The defendants justify on the ground, and the evidence tends to prove, that an unlawful assembly or mob was threatened, and that it was in view of the imminent danger to the public peace, and an anticipated violence and resistance to the laws, that the acts charged in the declaration were committed. It is to the rights, powers, and duties of the defendants, acting in their official capacities, in such an exigency, that the whole inquiry in the present case is to be limited.

By the sections of Stats. 1840, c. 92, above cited, it is provided, among other things, that the mayor of a city, or any other of the civil officers therein designated, may, in case a "tumult, riot, or mob shall be threatened, and the fact be made to appear to" him, issue his precept, the form of which is prescribed by section 27, to call out a division or any smaller body of the volunteer militia, "to aid the civil authority in suppressing such violence and supporting the laws." In exercising the authority thus conferred, the statute makes it the first duty of the mayor, or other magistrate, to determine whether the occasion for calling out a military force exists. This depends on a question of fact which it is his exclusive duty to determine. If it be made to appear to him that a tumult or riot is threatened, he may then issue his precept. He is, in his official capacity, and under the sanction of his oath of office, to examine and decide this question. This provision of the statute clearly confers a judicial power. Whenever the law vests in an officer or magistrate a right of judgment, and gives him a discretion to determine the facts on which such judgment is to be based, he necessarily exercises, within the limits of his jurisdiction, a judicial authority. So long as he acts within the fair scope of this authority, he is clothed with all the rights and immunities which appertain to judicial tribunals in the discharge of their appropriate functions. Of these, none is better settled than the wise and salutary rule of law by which all magistrates and officers, even when

exercising a special and limited jurisdiction, are exempted from liability for their judgments, or acts done in pursuance of them, if they do not exceed their authority; although the conclusions to which they arrive are false and erroneous. The grounds of their judgment cannot be inquired into, nor can they be held responsible therefor in a civil action: *Piper v. Pearson*, 2 Gray, 120 [61 Am. Dec. 438]; *Clarke v. May*, Id. 410 [61 Am. Dec. 470]. This protection and immunity are essential in order that the administration of justice and the discharge of important public duties may be impartial, independent, and uninfluenced by fear of consequences. And they are the necessary result of the nature of judicial power. It would be most unreasonable and unjust to hold a magistrate liable for the lawful and honest exercise of that judgment and discretion with which the law invested him, and which he was bound to use in the discharge of his official duties. Nor would there be any security or safeguard to the magistrate or other officer against liability, however careful and discreet he might be in exercising his authority, if his judgments were to be examined into and revised in ulterior proceedings against him, in the light of subsequent events upon new evidence, and with different means of forming conclusions from those upon which he was called upon to act in the performance of his duty. Such an *ex post facto* judgment might be more sound and wise, but it would not be a just or proper standard by which to try the opinions and conduct of an officer acting at a different time and under other circumstances. Especially is this true in a case like the one at bar, where a public officer is compelled to decide and act promptly, in a pressing emergency, and without time or opportunity for careful and deliberate consideration.

If any argument were needed to strengthen this view of the nature of the power conferred by the statute in question, or to show that it is in accordance with the intent of the legislature in creating that authority and jurisdiction, it may be found in the fact that the same power is granted by the statute to a court of record sitting within the county as is given to the commander-in-chief and mayors of cities. It is entirely clear that no liability could attach to the judge of a court for exercising his authority and judgment in a matter within his jurisdiction; and it is equally clear that the same rule must apply to other officers performing the same duty under the same grant of power.

It follows from these considerations that the question whether a riot was actually threatened cannot be inquired into in this

action. The judgment of the mayor upon it was conclusive, and having been rightly exercised within the limits of the authority conferred by law, no liability was incurred by him in issuing the precept by which the armed force was called out. Another result also follows as a necessary corollary. The precept of the mayor was in exact conformity to the terms of the statute. It was therefore a warrant regular on its face, issued by a magistrate of competent authority, within the scope of his jurisdiction. On familiar principles, it affords a complete justification to all those bound to obey its command for acts lawfully done by them in pursuance thereof: *Fisher v. McGirr*, 1 Gray, 45, 46 [61 Am. Dec. 381]; *Clarke v. May*, 2 Id. 410 [61 Am. Dec. 470].

The armed force having been legally called out and assembled at the place designated in the precept of the mayor, for the reason that "a tumult, riot, or mob was threatened," the important question arises as to the nature and extent of the authority of the mayor to employ the force for the prevention or suppression of the apprehended violence. A satisfactory answer to this inquiry is furnished by the statute itself, which expressly provides not only that a military force may be called out when a riot or tumult exists or is threatened, but declares the purpose for which it may be thus ordered to appear to be "to aid the civil authority in suppressing such violence and supporting the laws." This clearly includes threatened as well as existing violence and resistance to the laws. When, therefore, it is provided in section 29 that the troops assembled in pursuance of a precept issued under section 27 "shall obey and execute such orders as they may then and there receive according to law," it is manifestly intended to comprehend all necessary and proper orders issued by the officers designated in the statute to effect the purpose for which the military force is called out. If this purpose be to prevent a riot or other unlawful violence threatened, and not actually existing, then the civil officers have the right to employ the troops in all reasonable and proper means to effect this purpose, and the officers and men composing the armed force are bound to obey their commands. Indeed, it would be little else than absurd to say that a body of troops might be summoned to aid in carrying out an object distinctly specified in the statute; but that when they appeared in pursuance of such summons, no one could legally give them an order to accomplish the purpose for which they were assembled. The right and power to call them out for a particular purpose carries with it, by necessary and reasonable implication, the authority to employ them to effect

that object, and to issue all proper orders, and use all reasonable means therefor.

Any other construction of the statute would render its provisions, in case of a threatened riot or tumult, of no practical utility or advantage. If no orders could be legally issued to the troops after their assembly under the precept of a mayor or other civil officer, until a tumult, or riot, or other violent resistance to the laws actually existed, it is clear that they could not be effectually employed in efforts to prevent or suppress any anticipated outbreak or disturbance of the public peace.

Nor do we think any sound argument against the existence of a right in the civil officers to issue orders and employ an armed force to prevent a threatened tumult or riot can be drawn from the revised statutes, c. 129, sec. 5, which provide that when a riot or tumult actually exists, the military force called out to aid the civil authority shall, upon their arrival at the place of such riot or tumult, obey such orders as they may have received from such officers; on the contrary, the language of that statute clearly implies an authority previously vested in such officers to give all needful and proper orders to the troops to suppress the riot. The manifest purpose of that provision was not to confer a power on the officers named in chapter 12 to issue orders to the military force called out by their authority, but only to give the same power to any two of the other officers enumerated in section 1 of chapter 129, and by an express enactment to secure ample protection to the troops against any personal liability, while engaged in a difficult and perilous duty.

We have no doubt, therefore, that it was clearly within the authority conferred on the mayor by the statute to order the troops assembled by his precept, on the second of June, 1854, on Boston common, to repair thence to any designated portion of the city, there to perform a specific duty or service by him directed, such as clearing the streets from crowds, and preventing the ingress and egress of persons, if in his judgment it was expedient and necessary for the purpose of suppressing a tumult, or other unlawful violence and resistance to the laws, then and there threatened. And this is by no means an extraordinary power. A similar authority, in cases of actual riot or tumult, is vested in all magistrates and civil officers by the well-settled rules of the common law: 1 Hawk. P. C., c. 28, 4, sec. 11; *Rea v. Pinney*, 5 Car. & P. 254, 258, note; *Case of Arms*, Poph. 121.

It cannot be urged, as a valid argument against the recogni-

tion of this authority in civil officers, that it is liable to abuse, and may be made the instrument of oppression. The great security against its misuse and perversion is to be found in the discretion, good judgment, and honesty of purpose of those to whom important public duties are necessarily intrusted. But the existence of such authority is essential in a community where the first and most important use of law consists in preserving and protecting persons and property from unlawful violence. The same argument would apply with equal, if not greater, force to the authority clearly given to any two or more of the same officers, when a riot actually exists, to take life, if in their judgment necessary, in which case they are by express enactment to "be held guiltless and fully justified in law:" R. S., c. 129, sec. 5, 6.

But while thus recognizing the authority of civil officers to call out and use an armed force to aid in suppressing a riot or tumult actually existing, or preventing one which is threatened, it must be borne in mind that no power is conferred on the troops when so assembled to act independently of the civil authority. On the contrary, they are called out, in the words of the statute, "to aid the civil authority," not to usurp its functions or take its place. They are to act as an armed police only, subject to the absolute and exclusive control and direction of the magistrates and other civil officers designated in the statute, as to the specific duty or service which they are to perform. The statute does not even enlarge the power of the civil officers, by giving them any military authority; but only places at their disposal, in the exercise of their appropriate and legal functions, an organized, disciplined, and equipped body of men, capable of more efficient action in an emergency and among a multitude than an ordinary police force. Nor can the magistrate delegate his authority to the military force which he summons to his aid, or vest in the military authorities any discretionary power to take any steps or do any act to prevent or suppress a mob or riot. They must perform only such service and render such aid as is required by the civil officers. This is not only essential to guard against the use of excessive force and the exercise of irresponsible power, but it is required by the fundamental principles of our constitution, which provides that "the military power shall always be held in exact subordination to the civil authority, and be governed by it:" Declaration of Rights, art. 17. It does not follow from this, however, that the military force is to be taken wholly out of the control of its

proper officers. They are to direct its movements in the execution of the orders given by the civil officers, and to manage the details in which a specific service or duty is to be performed. But the service or duty must be first prescribed and designated by the civil authority.

In the present case, therefore, if the division marched from the common, where it was duly assembled and acting, solely under the proclamation of the mayor, bearing date of June 2, 1854, addressed to the citizens of Boston, a copy of which was sent to the major-general, in which it is stated that he and the chief of police are "clothed with full discretionary powers to sustain the laws of the land," and by virtue of the discretion thus given, proceeded to clear and guard the streets, it acted without any lawful authority, and the defendants Smith, Edmands, and Evans are legally responsible to the plaintiff for any act of force or violence committed upon him, in pursuance of their orders, or in which they or either of them participated.

If, however, it shall be made to appear that the act of clearing and guarding the streets was done in pursuance of a specific order from the mayor, either verbal or written, to effect that purpose, it would be a sufficient justification for all the acts of the defendants which were reasonable and necessary for the performance of this specific duty; and the plaintiff cannot recover, unless he can show that the force used towards him was excessive and unreasonable. Such specific order may be shown by proof that it was arranged between the mayor and the major-general that the service of clearing and guarding the streets was to be performed by the military force on the happening of a certain specified contingency or event, and that intelligence of the occurrence of such contingency or event was communicated to the major-general by the mayor, with an order to carry out and perform the specified duty previously designated and prescribed by him.

It was urged by the plaintiff that all the defendants were liable in this action, because the occasion of the alleged threatened riot or tumult was the surrender of a fugitive slave, and that the provision of the act of congress of 1850, c. 60, authorizing such surrender, was unconstitutional and void, and the proceedings of the United States commissioner in making the surrender illegal and invalid. But it is entirely clear that this argument can have no legitimate bearing on the legal issues presented in this case. The defendants Smith, Edmands, and Evans do not justify their acts under the proceedings of the United States com-

missioner, but solely under the provisions of law authorizing a military force to be called out for the prevention of a threatened riot, of which the removal of a fugitive slave was anticipated as the occasion. The only question, therefore, as to them is, whether they were legally called out, and acted under orders lawfully given by the civil authority. Besides, the right and duty of calling out a military force to repress and prevent an anticipated riot cannot be made to depend, in any degree, upon the cause of such threatened disturbance of the peace. It is equally the duty of the civil officers to take all proper steps to prevent a threatened riot or mob, whether it was likely to arise from the enforcement of a constitutional or unconstitutional law. Under our constitution, where the right is secured to every person "to find a remedy by having recourse to the laws for all injuries or wrongs which he may receive in his person, property, or character," a resort to unlawful violence cannot be necessary or justifiable. If a law be unconstitutional, those whose rights are infringed or invaded by it must seek their redress through the appropriate channels in the constituted tribunals of the country. If they have recourse to illegal violence, they break down the very constitution which they claim as their protection; and in striving to vindicate their own rights, they violate the rights of others.

Upon the evidence offered by the plaintiff at the trial, there are no sufficient grounds to authorize a jury to find a verdict against Freeman. The acts done by him had no other connection with those of the other defendants, by which the plaintiff alleges he was injured, than necessarily arose from the fact that the performance of his official act as marshal of the United States was the cause or occasion which rendered it necessary, in the judgment of the mayor, to call out a military force to prevent a threatened disturbance of the peace. He did not ask for the aid of any portion of the militia in the service of the process in his hands; but on the contrary, informed the mayor that no such aid was required. In advising that they should be called out to prevent a riot, he only asked for a legal exercise of the authority vested in the mayor. His statement that the expenses incurred by calling out the militia would probably be paid by the president, as they afterwards were, was only a voluntary offer to compensate the city for the lawful service of the military force. He is not shown to have advised or aided in the commission of any unauthorized or unlawful act by which the plaintiff was injured.

It follows that the question whether the military force was legally and properly called out cannot be drawn into controversy in this case. That was conclusively settled by the action of the mayor in issuing his precept according to the provisions of the statute, and therefore, the only questions as to the remaining defendants, Smith, Edmands, and Evans, are, whether specific orders were given by the mayor for clearing and guarding the streets on the second of June, 1854, and if so, whether any of the defendants acted unreasonably, or exceeded the just limits of the authority vested in them by law.

Of course, the question whether the acts charged in the declaration were the result of the orders given for the suppression of a riot, or were the consequence of a sudden outbreak, in which either of the defendants acted upon his own responsibility, will be open, to be determined upon the familiar principles applicable to actions of trespass upon the person. The defendants cannot be held for the unlawful acts of others, done without their authority, and not coming within the fair scope of the orders given by them. The defendants Smith and Edmands will not be liable to the plaintiff for any force and violence used upon him, beyond that which was necessary to carry into effect the order for clearing and guarding the streets, even if such order was not legally given, according to the rules and principles above stated. Not having been present at the alleged assault, they cannot be held liable for any unauthorized violence of their soldiers. The same rule would apply to Evans if he did not authorize or participate in the alleged violence offered to the plaintiff.

Case to stand for trial.

COMMANDING OFFICER, WHEN LIABLE FOR ACTS DONE BY MILITIA.—There is no distinction between the civil liability of an officer of the militia for damage caused to third parties through the execution of his commands, when not in the performance of public duty, and that of any other individual; and for any injury caused by the execution of his commands, he is liable to an action for damages, regardless of the absence of intent on his part to cause an injury and of his precautions to prevent it. His good intentions and carefulness become material only in mitigation or prevention of punitive damages and in exonerating him from criminal punishment. In *Castle v. Drugee*, 1 Abb. App. Dec. 327, the defendant, the commanding officer of the militia, during drill, ordered a volley to be fired with blank-cartridges, and took every reasonable precaution to prevent the loading of any gun with ball. By some mischance, one of the men loaded his gun with a ball-cartridge, and when fired the ball struck plaintiff. In holding the defendant liable, upon showing that he ordered the firing, and that one of the men fired a gun charged with a ball which wounded plaintiff, the court say: "But the defendant was not re-

quired by any public duty to cause his men to discharge their fire-arms at all while people were within musket range. The manner in which he was to drill and instruct them depended essentially upon his judgment and discretion. . . . But he, in directing the discharge, took upon himself, so far as a civil remedy was concerned, the responsibility of any injury which should result therefrom to any person. . . . It is of no consequence, so far as maintaining the action is concerned, that he acted upon the most plausible or the most reasonable grounds, and fully believed that the gun was not charged with anything which could injure another." The same rule is observed in England with reference to trespasses committed or injuries done by the militia when drilling or contesting for prizes: *Weaver v. Wood*, Hob. 134. And the commanding officer is likewise responsible for any other injuries caused by the execution of his commands, as frightening horses by the noise of drums or firing, etc.: *Childress v. Tourt*, 1 Meigga, 561, in which the court say: "To muster and drill men is lawful and laudable employment. It is the duty of the officer, but at the same time it must be so conducted as not to produce injury and loss to others. It must be done in the proper manner, the proper place, and the proper time, not negligently, not wantonly, not so as to injure others. If officers, tempted to exhibit themselves and their troops in the pride, pomp, and circumstance of mimic war, will invade the business resorts of towns and villages, and by unusual sights and sounds frighten the horses and upset the carriages of their neighbors, they must answer for the consequences." But if the acts done are done by the military while lawfully in the service of the civil authorities in quelling tumults, and the like, the order of the civil officers calling out the militia is a complete defense: See the principal case. Nor is the commanding officer liable for acts done by the militia after they have been dismissed from parade and the men are under direct control of subordinate officers, but such subordinate officers are liable: *Moody v. Ward*, 13 Mass. 299.

AUTHORITY OF COMMANDING OFFICER does not extend so far as to allow him to select a place for encampment without the consent of the owner of the land, and he is liable as a trespasser for taking possession of or using land under such circumstances: *Brigham v. Edmonds*, 7 Gray, 359; nor to impressing a horse of a citizen, even in time of war: *Jacobs v. Levering*, 2 Cranch, 117.

THE PRINCIPAL CASE IS CITED in *Belcher v. Farrar*, 8 Allen, 327, to the point that when the exercise of power requires officers to use their discretion and judgment in adjudicating on the subject-matter, the power vested in them is *quasi* judicial; in *Chenery v. Holden*, 16 Gray, 126, to the point that no action can be maintained against the selectmen of a town for the manner in which they exercise the discretion vested in them, although they may have erred in the conclusion to which they had arrived; also in *City of Salem v. Eastern R. R.*, 98 Mass. 444, to the point that the power of the mayor or other officers, under the statutes of Massachusetts, to call out a military force to suppress tumults, is of a *quasi* judicial character, by which not only the property but the lives of individuals may be affected, and which from its very nature must be exercised finally and conclusively without a hearing, or even notice to the parties who may be affected thereby.

SARGENT v. METCALF.

[5 GRAY, 306.]

CONDITIONAL SALE AND DELIVERY OF CHATTELS PASSES NO TITLE UNTIL CONDITIONS ARE PERFORMED, although the vendor knew the purchaser was a dealer, and had no use for the chattels except for resale; and a party who purchases the chattels in good faith from the vendee acquires no right thereto as against the original vendor, if no laches can be imputed to the latter in asserting his claim.

WAIVER OF CONDITIONS OF SALE AS TO PRICE IS NOT AFFECTED by asking for and being promised security for payment, no security in fact ever having been given.

REPLEVIN for two chaises. The plaintiffs, who were carriage dealers in Boston, sold and delivered to one Francis Polleys, in Walpole, two chaises, upon condition that Polleys should hold the chaises as the plaintiffs' goods, and the title should not vest in Polleys until he should pay the purchase price; that until payment he should not sell or otherwise dispose of the chaises without the plaintiffs' consent; and that upon his failure to pay the purchase price, or attempt to sell without the plaintiffs' consent, the plaintiffs might take possession of the chaises and hold them absolutely as their own. Several months afterwards a clerk of the plaintiffs went to Polleys to effect a settlement, and was informed by Polleys that he had sold the chaises to the defendant. The clerk demanded of Polleys a note for the balance due, with the defendant's indorsement, but the defendant refused to indorse. Upon the clerk's threatening to take possession of the chaises, Polleys gave him a bill of sale of an unfinished buggy, and promised to finish and send it to Boston to the plaintiffs. This Polleys failed to do, and the plaintiffs brought this action to recover the chaises of the defendant. The defendant, a livery-stable keeper in Walpole, offered to prove that Polleys was known to the plaintiffs to be a dealer in carriages, and that he had no use for the chaises except for resale; that a few days after the sale to Polleys he had purchased the chaises of Polleys in good faith and for a valuable consideration, and had no knowledge of the conditions of sale; and that he had taken possession of them at the time of his purchase, and had openly used them in his business up to the time of this action. This evidence was rejected, on the ground that it constituted no defense to the action. Verdict for the plaintiffs by consent, and exceptions by the defendant.

E. Wilkinson and W. Colburn, for the defendant.

J. J. Clarke, for the plaintiffs.

By Court, BUCKLOW, J. The agreement under which the plaintiffs delivered the property to Polleys shows a conditional sale and delivery only. The title was not to vest until the conditions were complied with. Although the defendant purchased the chaises in good faith, he acquired no right thereto as against the plaintiffs: *Coggill v. Hartford etc. R. R. Co.*, 3 Gray, 545.

The evidence in the case is insufficient to prove a waiver of the conditions of sale by the plaintiffs; and no laches in asserting their claim is imputed to them by the defendant.

Exceptions overruled.

CONDITIONAL SALE AND DELIVERY OF CHATTEL PASSES. NO TITLE UNTIL CONDITION IS PERFORMED, even as against a subsequent vendee for value and in good faith: See *Hussey v. Thornton*, 3 Am. Dec. 224; *Barrett v. Prichard*, 18 Id. 449, and note; *Whitwell v. Vincent*, 16 Id. 855; *Lane v. Borland*, 31 Id. 23; *Lucy v. Bundy*, 32 Id. 359. The principal case is cited to this effect in *Blanchard v. Child*, 7 Gray, 157; *Hirschorn v. Canney*, 98 Mass. 150; *Cole v. Berry*, 42 N. J. L. 314; *Dunbar v. Rawles*, 28 Ind. 231.

DOANE v. WILLCUTT.

[5 GRAY, 328.]

AFTER-ACQUIRED TITLE MAY BE SET UP BY PARTY TO DEED OF PARTITION, which recites the seisin in fee of the tenants in common, and contains mutual covenants for quiet enjoyment by each of the portions assigned to him.

CONVEYANCE INCLUDES LAND TO LOW-WATER MARK, where the land is bounded "by the sea or beach."

ACTION of tort for breaking and entering the plaintiff's close in Cohasset, and cutting and carrying away cedar trees growing therein. The defendant gave in evidence an indenture of partition, dated April, 1833, to which the plaintiff and his wife, and the defendant and his wife, Thankful Willcutt, were parties; and which recited that the wives and certain other persons were seised in fee as tenants in common of certain lands in Cohasset, that they had agreed to make partition so that each should hold a portion in severalty, and that Thankful Willcutt should thenceforth have some six acres and thirty-three rods of woodland, bounded "north-easterly by the sea or beach." The parties, for themselves, their heirs, etc., covenanted with each of the parties, their heirs, etc., that he or she "may henceforth and forever have, hold, use, occupy, and enjoy the same in severalty, free and discharged of all right, title, interest, or claim whatever of them or either of them, or of their heirs or assigns, or of any persons

claiming from, by, or under them, or any of them." The plaintiff relied on a deed made to him in May, 1838, by the administrator of one Zenas Loring, who, he claimed, had a paramount title to the lands. The defendant claimed that the plaintiff was estopped by the deed of partition from showing that the parties did not own the land assigned thereby to Thankful Willcutt, or to show a mistake in the boundaries. This point was decided in favor of the defendant, and the plaintiff excepted. It became a question of fact for the jury whether the alleged trespass was committed on the land lying between the "sea and the beach," the defendant claiming that the boundary was the sea, and the plaintiff could not assert title to any of the land so bounded. The judge ruled that as two boundaries were given, the plaintiff could show that the true north-east boundary was the beach, and he would not be estopped to claim the land between the beach and the sea by title from Loring. The judge was asked by the defendant to instruct the jury that the word "beach" meant all the land between the mainland and the sea over which the tide ebbed and flowed; but the judge charged that although it might include such land, it was not necessarily limited to that; and it was a question of fact for the jury to determine where the boundary expressed by the word "beach" was. Verdict for the plaintiff and exceptions by the defendant.

E. Avery, for the defendant.

J. J. Clarke and W. Colburn, for the plaintiff.

By Court, SHAW, C. J. From the manner in which this case is presented, we are apprehensive that the precise matter in controversy is not well understood. The *gravamen* of the complaint is the unlawful entry of the plaintiff's close in Cohasset, and cutting cedar trees there growing; and in another part of the case it is stated that it became a question of fact for the jury whether the alleged trespass was committed on that part of the said land lying between the beach and the sea, both being given as boundaries. Supposing the two distinct lines in the partition deed mean two distinct lines of boundary, which we shall consider hereafter, the "sea" must mean "low-water line," and the "beach" some part above it. How cedar trees or any other wood could grow on soil washed by the salt water at every tide, it is impossible to conceive, and we think there may be something omitted which would make the whole case intelligible. But perhaps sufficient appears to enable us to express an opinion upon the points raised in the argument.

1. The case comes before us on the exception of the defendant; but a point was decided in favor of the defendant, to which the plaintiff excepts; and as this lies at the foundation of the suit, and must present itself again on a new trial, and as it has been argued on both sides, we will first consider it.

There is no doubt that the parties to an indenture are bound and estopped against each other, in the same manner as by any other form of specialty; and where wives join with their husbands in conveying their estates, the lands pass by the conveyance, and the wives are bound by the estoppels, though from their legal incapacity to bind themselves they are not liable to actions on their covenants: *Colcord v. Swan*, 7 Mass. 291.

But still the question recurs, To what extent do the recitals and covenants of a deed bind the party, and from what acts and claims do they estop him? The indenture in the present case is a deed of partition, in which the plaintiff and his wife and the defendant and his wife are respectively parties; it recites that they, with the other parties named, are tenants in common in fee-simple of certain lands described; and it proceeds to assign to each party a part described to hold in severalty. These recitals and conveyances are followed by a qualified covenant, in which each party—say the plaintiff and wife—with each of the other parties—say the defendant and wife—for and with their respective heirs and assigns, do covenant and grant that he or she shall forever have and hold the same in severalty, free and discharged of all right, title, interest, or claim of them, or either of them.

Now, supposing that the recital in the partition deed does definitely describe the lot of land in which the trespass is alleged, and also does definitely describe the same lot as embraced in the purparty of Willcutt, then this deed does estop the plaintiff from denying that the parties were seised as tenants in common; that by force of the conveyance the defendants become seised in fee, in severalty, of the property assigned; and that all the right, title, and interest which the plaintiff then had in the premises passed to the defendant; and the qualified covenant carries it no further. It cannot have greater force than a direct covenant of seisin, which is not broken by the existence of an outstanding paramount title. It is a covenant that all the right, title, and interest which the plaintiff then had, together with a seisin *de facto* as against him, his heirs, and assigns, passed to the defendant. But we think it does not estop him from now asserting, and maintaining by proof, that at the time of the partition a

third party held an outstanding paramount title superior to that of either of these parties, and that the plaintiff afterwards acquired that title, and now relies upon it as a good and valid title. It admits that he was then seised, not of an indefeasible title, but *de facto*; that all the interest he had then passed to the defendant, and that he became seised *de facto* as against the plaintiff, by force of the conveyance: *Comstock v. Smith*, 13 Pick. 116 [28 Am. Dec. 670]; *Wight v. Shaw*, 5 Cush. 56.

This case is clearly distinguishable from that of a conveyance of land, with a general covenant of warranty against the lawful claims of all persons. There, if there be an outstanding title, and the grantor with such warranty acquires such title, it inures, without further act, to the use of his grantee, and operates, by way of estoppel, to confirm and make good the title he has warranted. It stands substantially upon the principle which gives force and effect to an estoppel in order to avoid circuitry of action. A general warranty is supposed not only to bind the grantor, but his privies in blood and estate; that is, all who could claim under him. If, therefore, the grantor, or any such party privy in blood or estate on whom such obligation to warrant has descended, should sue the original grantee and recover the land, on such after-acquired title, the party thus evicted will have a remedy on his warranty against the party who has evicted him, for an equivalent value. To avoid this circuitry, the party holding under such a warranty may rely on it by way of estoppel against the grantor, or any one claiming under him. No such estoppel can be claimed under this deed of partition, because it contains no general warranty.

As the case now stands, it appears to us that the plaintiff was not estopped by his deed of partition from setting up the title proposed. The burden is clearly on him to show that notwithstanding the premises were embraced in the partition, and included in the purparty of the defendant's wife, still a better and paramount title was then held by Zenas Loring, that he died seised of it, that it was duly sold under legal authority, and purchased by the plaintiff after the deed of partition, and was claimed and held by him at the time of bringing this action.

2. The other exception arises from the ruling of the court upon the construction in that clause in the deed of partition which assigns to Thankful Willcutt in severalty a lot bounded "north-easterly by the sea or beach."

The bill of exceptions and the direction of the court assume that here were two distinct lines of boundary mentioned, namely,

"the sea" or "the beach." They assume that there was some area or land lying between the beach and the sea, both being given as the north-east boundary. It appears to us that this was an erroneous view of the construction of the deed; that it designated not two lines, but one line, indicated by two words used synonymously.

All terms of description in conveyancing must be construed according to their natural force and effect in the use of language, and especially as applied to the subject-matter in regard to which they are used. The term "beach" we consider, when used in reference to places anywhere in the vicinity of the sea, or arms of the sea, as having a fixed, definite meaning, comprising the territory lying between the lines of high water and low water, over which the tide ebbs and flows. It is in this respect like "shore," "strand," or, as much used in this country, "flats." The term "shore" is well defined in *Storer v. Freeman*, 6 Mass. 439, to be the territory lying between high and low water mark, and of course having two sides, the land side and the sea side. In a conveyance, when a line of "shore" is used as an abuttal, unexplained by circumstances, it may be ambiguous, leaving it doubtful whether the sea side or the land side of the shore is intended. In general, it will appear by the context which. The term "beach," however, is usually applied to this part of the coast when not covered with water when the tide is out. Then when both terms are used, "the sea" or "shore," and used to designate one boundary, it appears quite clear that they were intended to describe that one side of the beach on which the sea coincides with it, and therefore to include the beach to low-water mark. This conclusion is strongly confirmed by the existence of the well-known rule of law, founded perhaps originally in the colony ordinance of Massachusetts of 1647, but now established by usage as the law of New England, that in all places about and upon salt water, where the sea ebbs and flows, the proprietor shall have propriety to low-water mark, contrary to the rule of the English common law. The owner of the upland adjoining tide-water *prima facie* owns to low-water mark; and does so in fact, unless the presumption is rebutted by proof that the upland and flats have been severed by himself or some previous owner by the conveyance of the one without the other in whole or in part. When, therefore, such owner of the shore conveys by a boundary on the "sea" or "sea-shore," or "tide-water," or any similar expression, the law gives effect to it, and extends it to low-water mark.

The court having declined so to instruct the jury, but having assumed that two distinct lines on the sea-shore side of the tract conveyed were intended by the description, leaving a space between them, we are of opinion that the direction was incorrect, that the exception of the defendant must be sustained, and a new trial had in the court of common pleas.

THE PRINCIPAL CASE, AS IT AGAIN CAME BEFORE THE COURT, is reported in 16 Gray, 368.

AFTER-ACQUIRED TITLE, WHEN INURES TO BENEFIT OF GRANTEE: See *Frost v. Darst*, 58 Am. Dec. 575, and notes; *Blanchard v. Ellis*, 61 Id. 417.

CONVEYANCE, WHEN EXTENDS TO LOW-WATER MARK: See note to *Arnold v. Mundy*, 10 Am. Dec. 388. Since the colony ordinance of Massachusetts of 1647, any grant will pass the flats as far as the grantor owns, if not restricted by specific description, but bounded generally by the tide-water, by whatever name: *City of Boston v. Richardson*, 105 Mass. 355; but a conveyance "bounded westerly by the beach," without any terms connected with the word "beach" which would indicate an intent to include the beach, does not include the land between high and low water mark: *Niles v. Patch*, 13 Gray, 258. The principal case is cited to the foregoing points, and is also cited in *Hathaway v. Wilson*, 123 Mass. 361, to the point that the strict legal meaning of the word "shore" is doubtless the land between ordinary high and low water mark, but it may be shown by a consideration of the whole instrument, and of monuments referred to therein, to have been used untechnically and without legal accuracy, as importing low-water mark.

LUSCOMB v. BALLARD.

[5 GRAY, 403.]

EXECUTOR CANNOT BE CHARGED IN ANY CAPACITY FOR SERVICES BENEFICIAL TO ESTATE, rendered before his appointment and without his assent, under contracts with a special administrator, and with another executor named in the will.

ACTION of contract. It appeared that the defendant and one Osborn were named as executors in the will of Nathan Cook, deceased. Pending the probating of the will, one Foster was appointed special administrator. Osborn declined to act as executor, and the defendant was appointed sole executor. Prior to these appointments, and a few days after Cook's death, Osborn, acting in the capacity of executor, employed the plaintiff to take care of the house and furniture, and agreed to pay him a fair compensation therefor. The special administrator did not discharge the plaintiff, but allowed him to take care of the premises. The defendant objected to evidence of a contract by Osborn to pay for services, on the ground that he had no author-

ity to bind the estate, and also asserted that the defendant was not liable for services rendered at the request of Osborn or the special administrator; but the evidence was admitted, the judge ruling that the action could be maintained for such services as were beneficial to the estate. The jury gave a verdict for the plaintiff, and also specially found that the defendant in no way assented to the employment of the plaintiff. Exceptions by the defendant.

J. W. Perry, for the defendant.

S. H. Phillips, for the plaintiff.

By Court, THOMAS, J. The jury have found that the defendant neither caused, nor in any way assented to, the employment of the plaintiff for the services for which this suit is brought. He cannot therefore be charged *de bonis propriis*.

If not liable as of his own goods, has the estate in his hands been charged by the acts of Osborn, or the special administrator, so that there may be a judgment *de bonis testatoris*? We think not; but that the law is that by a promise, the consideration of which arises after the death of the testator or intestate, the estate cannot be charged, but that the executor or administrator is personally liable on his contract. And whether the amount is to be repaid from the estate is a question for the court of probate in the settlement of his account.

The old doctrine seems to have been that upon any promise made after the death of the testator or intestate the executor or administrator was chargeable, if at all, as of his own goods, and not in his representative capacity: *Trewinian v. Howell*, Cro. Eliz. 91; *Hawkes v. Saunders*, Cowp. 289; *Jennings v. Newman*, 4 T. R. 348; *Brigden v. Parkes*, 2 Bos. & Pul. 424.

The more recent authorities, however, have settled that an executor may, in some cases, be sued in his representative capacity on a promise made by him as executor; and a judgment had *de bonis testatoris*. But it will be found that in these cases that which constituted the consideration of the promise, or the cause of action, arose in the life-time of the testator: *Dowse v. Coxe*, 3 Bing. 26; *Powell v. Graham*, 7 Taunt. 580; *Ashby v. Ashby*, 7 Barn. & Cress. 444. And an action for goods sold and delivered to one as executor, or for work done for one as executor, charges the defendant personally, and not in his representative character: *Corner v. Shew*, 3 Mee. & W. 350. See also *Forster v. Fuller*, 6 Mass. 58; *Sumner v. Williams*, 8 Id. 162;

Davis v. French, 20 Me. 21 [37 Am. Dec. 36]; *Myer v. Cole*, 12 Johns. 349.

In this commonwealth an exception is made in the case of personal expenses for the deceased. For these the executor or administrator may be charged in his representative character, and judgment be rendered *de bonis testatoris*. But the case stands on its peculiar ground, and is to be limited to it: *Hapgood v. Houghton*, 10 Pick. 147.

The modern English doctrine on this point is that if the executor or administrator gives orders for the funeral, or ratifies or adopts the acts of another party who has given orders, he makes himself liable personally, and not in his representative capacity: *Brice v. Wilson*, 8 Ad. & El. 349, note; *Corner v. Shew*, 3 Mee. & W. 350; 2 Williams on Executors, 1522.

If the contract of Osborn, or of the special administrator, did not charge the estate, of course the defendant can in no form be liable.

In this view of the case, it is unnecessary to consider how far the contract of Osborn, who was named executor in the will, but declined the trust, could bind the estate. If the executor could not so charge the estate, *a fortiori* one who never accepted the trust could not.

Exceptions sustained.

CONTRACTS MADE WITH EXECUTOR OR ADMINISTRATOR ARE PERSONAL, and do not bind the estate: *Davis v. French*, 37 Am. Dec. 36, and note collecting prior cases; *Fitzhugh's Ex'r v. Fitzhugh*, 62 Id. 653; see also *Mason v. Caldwell*, 48 Id. 330. He can make no contract which shall bind the estate by a new promise, but he is personally liable; and whether the amount is to be repaid from the estate is a question for the court of probate in the settlement of his account: *Kingman v. Oakes*, 132 Mass. 288; *Merchants' National Bank v. Weeks*, 53 Vt. 118, citing and quoting the principal case to this point.

GLOUCESTER MANUFACTURING COMPANY v. HOWARD FIRE INSURANCE COMPANY.

[5 GRAY, 497.]

INSURANCE AGENTS WITH GENERAL POWERS TO FILL UP AND ISSUE POLICIES HAVE AUTHORITY, before the delivery and acceptance of a policy and payment of the premium, to change or modify the description of the property by adding a memorandum that the buildings insured were in course of construction.

INSURED IS NOT AFFECTED BY OMISSION OF INSURANCE AGENTS TO COMPLY WITH INSTRUCTIONS to transmit to the company copies of the written

parts of all policies issued by the agents, and of any indorsements made thereon by them.

WARRANTY OF "WATER-TANKS WELL SUPPLIED WITH WATER AT ALL TIMES" IS COMPLIED WITH, when the insurance is upon buildings in course of construction, if the tanks, although not completed and supplied with water, are constructed with all reasonable diligence, having reference to the progress in the construction of the buildings insured.

ACTION of contract on a policy of insurance on the plaintiffs' bleachery. Gillett & Coggeshall were general agents of the defendants at Philadelphia, and were furnished with blank policies signed by the president and secretary of the company, which they were authorized to fill up, indorse, countersign, and issue. The policy in question was made out and countersigned by the agents in October 14, 1851, and remained in their possession until December 8, when the treasurer of the plaintiff called for it, but refused to receive it in the form in which it was. The agents then signed a memorandum in the margin, to the effect that "it is hereby understood that this company shall be liable for any losses which may be caused by fire from the bursting of the boilers, notwithstanding the exceptions named in the policy. No exception of any articles used in dyeing and bleaching, or such as res. It from the kind of business. Buildings in course of construction." And thereupon the treasurer took the policy and paid the premium. The buildings had appeared by the application, which was made a part of the policy and its statements warranties, to be finished; and the conditions provided that applications for insurance should specify the construction and materials of the buildings insured. The application also contained a statement of "water-tanks well supplied with water at all times." The buildings were in course of construction when the application was signed and until the loss, and there was no water-tank upon the premises, but one was in process of construction as fast as was usual in the construction of a bleachery, and without unreasonable delay. Gillett & Coggeshall were instructed to send to the company, at the end of each month, copies of the written parts of all policies issued by them, and of any indorsements made thereon by them, but it was not shown that the plaintiffs knew of these instructions. The agents, about November 1st, without the plaintiffs' knowledge, had sent the company a copy of the written portion of the policy in question, and of the survey or application, and paid the amount of the premium, but the company did not know of the memorandum until after the buildings were burned. The court ruled that if the plaintiffs did not pay the premium until

December 8th, and the policy was not delivered to or accepted by them until that time, then the defendants were bound by the indorsement; that upon the facts proved, the plaintiffs were not bound to have the tanks filled with water at all times from the commencement of the risk; and that if the tanks were reasonably advanced towards completion, compared with the state of the buildings insured, and were being finished without unnecessary delay and with reasonable dispatch, the plaintiffs would be entitled to recover. A verdict for the plaintiffs was taken, to be set aside if the rulings were not correct.

C. W. Loring, for the plaintiffs.

J. G. Abbott and B. Dean, for the defendants.

By Court, DEWEY, J. This case presents the question of the agency of Gillett & Coggeshall under circumstances indicating a very general and extended agency as to issuing policies in behalf of the defendants. These agents were furnished with blank policies, which were to be filled up, indorsed, and issued at their discretion. It is fully conceded that, as to the rate of premium, the amount of the risk, and the nature of it, the power of these agents was unlimited. If the memorandum or indorsement of December 8, 1851, had been made by these agents upon this policy at the time of its original date, and before any other proceedings had taken place, we apprehend it would have been quite clear that it would have constituted a part of the policy, and properly be referred to as explanatory of the nature of the risk. It was not, however, indorsed on the policy at the time that the policy was countersigned by the agents, on the fourteenth of October, 1851. The question then arises as to the power and authority of the agents to make this indorsement at the later period of December 8, 1851.

Had the plaintiffs received their policy on the fourteenth of October, 1851, and paid the premium therefor, it might present a very different question from that now before us, which must be decided upon its own peculiar facts. Among these facts is the important one that the policy had never been delivered, no premium paid by the plaintiffs, and nothing done which would have secured to the plaintiffs the benefits of the policy had any loss by fire occurred to the property before the eighth of December. On the last-named day the plaintiffs, upon examination of the policy as originally prepared, refused to take it in the form in which it then was. At that time no policy had been delivered. These agents were clothed with general powers, as

to filling up and issuing policies. Having the authority to make an original contract of insurance with terms similar to those found in this policy, they had authority, before the delivery of the policy, to enlarge it from its first draught by a change or modification of the description of the property insured, so as to embrace the case of a building unfinished, but then in the process of construction. This they did, and the policy in this form was accepted by the plaintiffs; and, as between insurers and assured, this contract was entered into on the eighth of December, and is to be treated as of that date.

If the agents of the defendants failed to transmit to their principals a copy of the written part of this policy, as it existed at the time of its delivery on the eighth of December, with the change in the description of the state and situation of the property insured from that which they had forwarded to the defendants in the month of November previous, the responsibility for such omission is not upon the plaintiffs..

We are of opinion that this policy is to be taken to be a policy "upon buildings in course of construction."

The further inquiry then arises as to the effect which this qualification of the original description of the risk is to have upon the stipulation as to "water-tanks well supplied with water at all times." It is contended on the part of the defendants that this stipulation is equally operative, and requires a like literal compliance if the policy be applied to buildings in the course of construction. But the court are of opinion that the insurance on the property having been modified so as to be an insurance "upon buildings in the course of construction" at the time of issuing the policy, the statements in the application must be taken to be made with reference to such state of the buildings, and require a performance of the conditions or stipulations adapted to that state of things. The water-tanks were to be supplied with all reasonable diligence, having reference to the progress in the construction of the building insured. The plaintiffs were not, under such a policy upon buildings in the course of construction, required to have at all times, from the first moment the policy issued, "water-tanks well supplied with water at all times," in the manner and to the extent they would have been required to have had them had the policy been upon a finished building.

Judgment on the verdict for the plaintiffs.

POWERS OF GENERAL INSURANCE AGENTS: See *Bebee v. Hartford Co. Mut. F. Ins. Co.*, 65 Am. Dec. 553; *Sheldon v. Connecticut Mutual L. Ins. Co.*, 68 Am. Dec. 565. A general agent may bind the company by new clauses or

conditions inserted by him before issuing the policy: *Miner v. Phoenix Ins. Co.*, 27 Wis. 702; and general agents, charged with the whole duty of settling a loss, as a necessary incident have the power to dispense with those stipulations for the benefit of the company which have reference to the mode of ascertaining the liability and limiting the right of action: *Little v. Phoenix Ins. Co.*, 123 Mass. 368; S. C., 25 Am. Rep. 102; *Atlas Ins. Co. v. Sawyer*, 85 Ind. 384. The principal case has been cited to the foregoing points.

MULBRY v. MOHAWK VALLEY INSURANCE COMPANY.

[5 GRAY, 541.]

DEFENSES IN AVOIDANCE OF ACTION MUST BE ALLEGED IN ANSWER, under the Massachusetts practice act, Stats. 1852, c. 312, in order to avail the defendant, although first disclosed by the plaintiff's evidence.

EXPERT EVIDENCE IS INCOMPETENT if the facts proposed to be proved are within the common experience of mankind; as to show that the failure to occupy buildings insured increased the risk.

ACTION OF CONTRACT ON A POLICY OF INSURANCE. The facts are stated in the opinion.

J. H. Wakefield, for the defendants.

W. Gaston and J. W. May, for the plaintiff.

By Court, BICKLOW, J. The defendants in this case relied at the trial upon two grounds of defense to the claim of the plaintiff under his policy. One was that the premises, after the policy was made and at the time of the fire, were used for the sale of spirituous liquors contrary to an express stipulation on the part of the plaintiff, and that the policy was thereby rendered void. This ground of defense was fully stated in the answer of the defendants, and the question of fact arising thereon was submitted to the jury, who returned their verdict on this point in favor of the plaintiff.

The other ground of defense was that spirituous liquors were kept and sold on the premises by the plaintiff at the time the policy was made and issued, and that this use of the premises was not stated by the plaintiff in his application for insurance, as required by the conditions annexed to the policy, and that for this reason the plaintiff could not recover. This ground of defense was not set out by the defendants in their answer. It appeared, however, in the course of the trial, on the cross-examination of the plaintiff's witnesses, that the premises were so used by the plaintiff at the time of making his application, and at the date of his policy. Upon this state of facts, which was

not controverted by the plaintiff at the trial, the defendants contended, and asked the court to rule, that the plaintiff, upon a just construction of the policy, and of the terms and conditions annexed to it, could not recover. The judge who presided at the trial refused so to rule, and it is upon this refusal that the case now comes before the whole court.

We have not found it necessary to determine whether the facts disclosed by the plaintiff's witnesses, as to the use of the premises at the time the policy was issued, would render it void; because we are of opinion that this defense is not open to the defendants, inasmuch as it was not set forth in their answer. Formerly, by pleading the general issue, everything was open to proof, which went to show that the plaintiff's claim was invalid through fraud or illegality, or was in its inception void in law: *Hulet v. Stratton*, 5 Cush. 539; *Dixie v. Abbott*, 7 Id. 610. But the practice act, Stats. 1852, c. 312, by abolishing the general issue and substituting therefor an answer which is required to contain precise, certain, and substantial averments and denials, and providing that every matter averred in the declaration and not denied by the answer shall be deemed to be admitted, effected a material change, not only in the forms of pleading, but also in the mode of making up issues of fact between the parties. There being now no general form of denying the plaintiff's right to recover, the defendant is compelled, by sections 14 and 26, to deny every substantive fact alleged by the plaintiff in his declaration, or declare his ignorance thereof and leave the plaintiff to his proof. These provisions enable the defendant, by an answer denying the plaintiff's allegations, to put in issue only such matters as are properly averred in the plaintiff's declaration. The plaintiff, by section 2, is required to make no allegations except those which he is bound by law to prove. Therefore, the defendant, by merely answering the allegations in the plaintiff's declaration, can try only such questions of fact as are necessary to sustain the plaintiff's case. He cannot thus put in issue matters which go to defeat or avoid it, and it is accordingly provided by section 18 that the answer shall set forth in clear and precise terms each substantive fact intended to be relied on in avoidance of the action, by which are intended to be embraced all matters which cannot be proved under the denial of the allegations in the plaintiff's declaration. It follows as a necessary consequence that whenever a defendant intends to rest his defense upon any fact which is not included in the allegations necessary to the support of the plaintiff's case, he

must set it out in clear and precise terms in his answer; and as the plaintiff is not bound to aver anything which tends to defeat his action, or which shows that his claim is illegal or void in its inception or otherwise, all such matters must be set out and averred in the answer under the eighteenth section of the practice act. This constitutes the main difference between the system of pleading established by the practice act and that which was previously in force. Thus understood and administered, it is plain that the practice act is intended to bring the parties to a cause by their pleadings to clear and precise issues of fact, and all immaterial and unnecessary averments are wholly excluded.

This decision is but an extension and application to other forms of declaration of the principle of construction already laid down by this court in actions on the common counts, or on an account annexed: *Granger v. Ilsley*, 2 Gray, 521.

Applying this construction of the statute to the answer of the defendants in the case at bar, it is manifest that the defense relied upon was not open to the defendants. Proof that the policy was void in its inception, by reason of misrepresentation or concealment on the part of the plaintiff of material facts, was clearly in avoidance of the action. It did not come within any of the allegations contained in the plaintiff's declaration. He was not bound to aver or prove any such fact. It was for the defendants to allege and prove it as a distinct substantive ground of defense.

It was urged at the argument that it was always competent for the defendant to take advantage of any matter in defense to an action, which was disclosed by the plaintiff's own testimony. This was true to a certain extent, when the general issue was pleaded, because under it all matters which tended to prove the original invalidity of the plaintiff's claim were open and competent to be proved. But, for the reasons already given, it is otherwise under the system of pleading established by the practice act. Nothing is open and competent to be proved, except what is comprehended in the distinct averments and denials of the parties. All other matters are irrelevant to the issue. Strictly speaking, therefore, all the evidence drawn out of the plaintiff's witnesses on cross-examination, which tended to show that spirituous liquors were kept and sold on the premises at the time of making the policy, was incompetent and irrelevant because no such issue was before the jury on the pleadings. It might therefore have been properly excluded; but being in, it

cannot be used to defeat the plaintiff's claim on a ground not set out in the answer.

Of course it is always in the power of the court, in the exercise of its discretion, to allow amendments to the answer of a defendant, where facts material to the defense are disclosed by the testimony of the plaintiff, which, by the use of due diligence, could not have been known to the defendant so that he could avail himself of them in his answer. But in the case at bar no such surprise was shown as would warrant the allowance of an amendment to the answer; and none was in fact moved for at the trial.

The ruling of the court rejecting the evidence of certain officers and agents of insurance companies in Boston, offered as experts "to prove that the failure of the applicant and his men, or any one else, to occupy the said building for lodging increased the risk and was material thereto," was clearly right. The facts proposed to be proved by them were of a character equally within the knowledge of the jury as of the witnesses, and were not such as to render the opinions of witnesses competent. The case at bar is widely different from that of *Webber v. Eastern Railroad*, 2 Met. 147, cited by the defendants. There the fact to be proved was that insurance companies charged an increased premium on a certain class of risks. This fact could be proved satisfactorily by those only who were so familiar with the business of insurance as to be able to testify on the points. But the facts in the present case were within the common experience of all mankind.

Exceptions overruled.

MATTERS IN AVOIDANCE NOT SPECIFIED IN ANSWER CANNOT BE RELIED ON TO DEFEAT ACTION, under Mass. Stats. 1852, c. 312: *Haskins v. Hamilton Mut. Ins. Co.*, 5 Gray, 438; *Bradford v. Tinkham*, 6 Id. 495; *Howard v. Hayward*, 16 Id. 358; *Cushman v. Davis*, 3 Allen, 100; *Ward v. Bartlett*, 12 Id. 420; *Campbell v. New England Mut. L. Ins. Co.*, 98 Mass. 394; *Amsinck v. American Ins. Co.*, 129 Id. 188; although first disclosed by the plaintiff's evidence: *Haskins v. Hamilton Mut. Ins. Co.*, *supra*; *Goodwin v. Daniels*, 7 Allen, 64. But where the only tendency of a deed relied upon by the defendant in an action in the nature of trespass to real estate was to disprove the allegation of seisin by the plaintiff, the statute does not require that to make it admissible in evidence it should have been set forth in the answer: *Walker v. Swasey*, 2 Id. 314; and in an action on an account annexed for services, if the answer contains a general denial, the defendant may introduce evidence of the plaintiff's negligence and want of skill: *Caverly v. McOwen*, 123 Mass. 578. It is only when the defendant relies on some substantive distinct fact not alleged by the plaintiff, or included in the averments in the declaration, that it is necessary to set it forth in the answer: *Jones v. In-*

Habitants of Andover, 12 Allen, 21. The principal case is cited in all the foregoing; and it is also cited, with others, in *Boston Relief etc. Co. v. Burnett*, 1 Id. 411, as stating the difference between what the practice act requires in an answer and the "general issue" which it abolished.

EXPERT EVIDENCE IN INSURANCE CASES.—Insurance men cannot testify as to the increased liability to fire in unoccupied buildings: *Dillard v. State*, 58 Mass. 389. Whether a change in the occupation of a dwelling-house increased its liability to be destroyed is a subject within common knowledge, and upon which the opinions of witnesses are inadmissible: *Luce v. Dorchester Mut. F. Ins. Co.*, 105 Mass. 301; and generally a witness cannot be allowed to testify as an expert to his own individual opinion merely upon the issue whether the risk was increased, when that depends upon facts which involve no peculiar science or information, but are within the common knowledge of men: *Lyman v. State Mut. F. Ins. Co.*, 14 Allen, 335; but the matter whether underwriters would charge a higher premium is a matter within the peculiar knowledge of persons versed in the business of insurance, and the testimony of experts is admissible: *Luce v. Dorchester Mut. F. Ins. Co.*, 105 Mass. 302. The principal case is cited to the foregoing points. See further, on expert testimony in insurance matters, *Jefferson Ins. Co. v. Coheal*, 22 Am. Dec. 567; *Daniels v. Hudson River F. Ins. Co.*, 59 Id. 192; *Hartford Protection Ins. Co. v. Harmer*, Id. 634. Opinions of witnesses are never received as evidence where all the facts on which they are founded can be ascertained and made intelligible to the court or jury: *Clark v. Fisher*, 19 Id. 402.

EASTERN RAILROAD COMPANY v. BENEDICT.

[5 GRAY, 561.]

RAILROAD COMPANY MAY SUE IN ITS OWN NAME on a written order to deliver stock to "D. A. N., president of the Eastern Railroad Company."

ACTION of contract upon the following written order, which the defendants had agreed to accept: "Salem, Mass., twenty-fourth of September, 1850. Messrs. Benedict & Warren. Gentlemen: Please give Mr. D. A. Neale, president of the Eastern Railroad Company, stock in the Salem Gas Company at par, to the amount of seven thousand dollars, and place the same to my account. Yours respectfully, Leonard Fuller." The defendants objected that the action could not be maintained in the name of the plaintiffs, and that parol evidence was not admissible to show that the consideration of the order was iron furnished by the plaintiffs to Fuller. The objection was sustained, and a nonsuit was directed, subject to the opinion of the whole court.

G. M. Browne, for the plaintiffs.

J. P. Healy, for the defendants.

By Court, DEWEY, J. The only ground of objection to maintaining the present action is that the acceptance of this order by the defendants created a liability on the same solely in favor of D. A. Neale, and one that could be enforced only by an action in his name. This is said to result from the nature of the draft accepted by the defendants. It is said that the name of the plaintiffs does not appear on the face of the paper as the payees thereof, and that no oral evidence can be properly admitted to show that they were the real party in interest, and that D. A. Neale was merely their agent contracting in their behalf.

To a certain extent, and under some circumstances, the adjudicated cases seem to furnish abundant authority to the point that where a contract is made with an agent the principal may sue thereon in his own name. Thus in *Skinner v. Stocks*, 4 Barn. & Ald. 437, it was held that an action might be maintained either in the name of the person with whom the contract was made or in the name of the party really in interest. In *Sims v. Bond*, 5 Barn. & Adol. 393, S. C., 2 Nev. & M. 614, Lord Chief Justice Denman says: "It is a well-established rule of law, that where a contract not under seal is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it; the defendant in the latter case being entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the contracting party." In Paley on Agency, 8d Am. ed., 324, we find the same principle stated, that the principal may sue in his own name to enforce rights acquired by his agent in a course of dealing in his behalf. Angell & Ames on Corp., sec. 316, is to the same effect.

We may assume it to be quite clear, and well supported by authority, that in the case of oral contracts the principal may sue in his own name upon a contract made with his agent. It is equally well settled that the same rule applies to cases of sales by written bills, or other memoranda made by the agent, using his own name, and disclosing no principal: *Huntington v. Knox*, 7 Cush. 371; *Edwards v. Golding*, 20 Vt. 30; *Hubbert v. Borden*, 6 Whart. 79; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. 454, 455. In *Wilson v. Hart*, 7 Taunt. 304, Parke, J., says: "It is the constant course to show by parol evidence whether a contracting party is agent or principal." In *Potter v. Yale College*, 8 Conn. 60, Chief Justice Hosmer says: "I admit the principle, that where an agreement is made with an agent,

for the sole and exclusive benefit of his principal, the principal has the legal interest."

In the case of *Beckham v. Drake*, 9 Mee. & W. 79, this subject was much considered in the very full arguments of the counsel, as well as in the several opinions given by the members of the court, and the result was that it was held that the parties really contracting are the parties to sue in a court of justice, although the contract be in the name of another, and that this rule was to be applied not only to oral contracts, but to cases of ordinary mercantile contracts in writing. Parke, B., says: "The case of bills of exchange is an exception which stands upon the law merchant; and promissory notes another, for they are placed on the same footing by the statute of Anne."

It is unnecessary in the present case to decide whether upon a mere naked written promise made with one person, without any reference in the instrument to an agency, the action, upon proof of such agency in fact, might be maintained in the name of the principal. We are aware that it is contended that the promise is directly and exclusively a promise to D. A. Neale, and that the addition of "president of the Eastern Railroad Company" must be rejected as merely *descriptio personæ*. But this position we think is not maintainable. This written instrument may properly be held to disclose an agency, and to indicate enough to authorize an action in behalf of the railroad company, upon actual proof that the bargain was made on their account.

The case of *Commercial Bank v. French*, 21 Pick. 486 [32 Am. Dec. 280], strongly illustrates and sustains this view. That was an action on a promise to pay "the cashier of the Commercial Bank," and the objection taken was that the action could only be maintained in the name of the cashier. But it was held that such description sufficiently indicated the contract to be one in which the bank was the party in interest and authorized to maintain the action in its own name. It is true that the promise was there made "to the cashier," and not to "A B, cashier of the Commercial Bank;" and some importance was given in the opinion to that circumstance, but the principle upon which the opinion was based would equally have applied to the case of a promise to "A B, cashier," etc. It was said by the court: "The principle is, that the promise must be understood according to the intention of the parties. If, in truth, it be an undertaking to the corporation, whether by a right or a wrong name, whether the name of the corporation or some of its officers be used, it should be declared on and treated as a promise to the corporation."

In *Pigott v. Thompson*, 3 Bos. & Pul. 147, where commissioners for draining certain lands were authorized to receive tolls, and the defendant had agreed in writing to pay "to the treasurer of the commissioners" certain tolls, it was held that the action was properly brought in the name of the commissioners. In the case of *Trustees etc. in Levant v. Parks*, 10 Me. 441, it was held that a note of hand, made payable to an individual as treasurer of a corporation, might properly be sued in the name of the corporation; and in *State v. Boies*, 11 Id. 474, it was held that the action was properly brought in the name of the state of Maine, upon a note given to "James Irish, land agent of Maine." In the case of *Garland v. Reynolds*, 20 Id. 45, which was an action brought upon a note given "to Enoch Huntington, treasurer of the committee of the surplus revenue," it was held that the action might be maintained in the name of the town for which the committee were acting.

In *Vermont Central R. R. v. Claves*, 21 Vt. 30, an action upon a note of hand, payable to "the commissioners of the Vermont Central Railroad Company," the consideration of which was a subscription for shares in that company, was maintained in the name of the company, to whom the note had been delivered by the commissioners. And in *Rulland & Burlington R. R. v. Cole*, 24 Id. 33, upon a note of hand payable "to the order of Samuel Henshaw, treasurer," etc., it appearing by other evidence that Henshaw was treasurer of the corporation, and that the consideration of the promise proceeded from the corporation, the action was held well brought by them.

The defendants have referred to the case of *Moss v. Livingston*, 4 N. Y. 208, as adverse to the maintenance of the present action. That was an action brought by an indorsee of a bill of exchange accepted by "John R. Livingston, president Rosendale Manufacturing Company," and he was held personally liable. Many cases will be found of that character; and in reference to negotiable instruments, the doctrine seems to be maintained by numerous adjudications that in such cases, for the purpose of charging the party who has thus signed his own name, the addition of "treasurer" may be rejected as mere *descriptio personæ*. That case is not, however, a parallel one with the present, as here no third party is sought to be charged, and the only inquiry is whether enough appears upon the face of the instrument to authorize the real party in interest, upon fully showing that interest, to sue in his own name.

That the corporation may be held liable upon a note signed

by "G. L. Chandler, treasurer of the Dorchester Turnpike Corporation," upon its appearing that it was the real contract of the corporation, was the doctrine of our own case of *Mann v. Chandler*, 9 Mass. 336. The cases of *Gilmore v. Pope*, 5 Id. 491, and *Thunton etc. Turnpike v. Whiting*, 10 Id. 327 [6 Am. Dec. 124], in both of which this court held that an action might be maintained by a corporation, upon a written contract promising to pay their agent, are more directly in point, as they are cases where the question arose upon the right of the plaintiffs to sue upon the contract, which is the present case.

More reliance was placed by the defendants upon the case of *Stackpole v. Arnold*, 11 Mass. 27 [6 Am. Dec. 150]. The notes, the subject of that action, were signed by Zebedee Cook, some by his own name, and one by the name of Cook & Foster, a house in which he was a partner, and contained on their face no allusion to John Arnold, the defendant, as a principal, nor anything indicating an agency in his behalf. They were negotiable notes, as appears by a recurrence to the files in that case, although not so stated in the printed report. It was an attempt to charge a third party whose name did not appear in the instrument. The question was as to the competency of oral evidence to show that the notes were given for premiums on policies of insurance, procured at the request and for the use of the defendant, on property belonging to him, and that the party signing the notes acted as agent of the defendant merely. The objection taken and sustained by the court was that oral testimony could not be received to control and vary the written contract so as to make them the notes of Arnold. The rule of law was stated to be that "no person in making a contract is considered to be the agent of another, unless he stipulates for his principal by name, stating his agency in the instrument which he signs." It was further stated that no person could be charged as the maker of any written contract signed by another, unless the signer professed to act by procuration or authority, and stated the name of the principal, on whose behalf he made his signature. This last position must be taken with some qualification.

But the doctrine of *Stackpole v. Arnold*, *supra*, is not to be applied to this case, for two reasons: 1. Because that was a case of a naked signature of the name of the party signing, without any, even the slightest, indication that it was made in behalf of another person; 2. It was a negotiable promissory note, as to which a distinction prevails in the introduction of oral evidence to show a party in interest whose name is not disclosed on the

face of the note. We have no reason to suppose that the court, in the opinion given in that case, intended to overrule their own previous decisions in the cases of *Gilmore v. Pope* and *Taunton etc. Turnpike v. Whiting*, above referred to.

Looking at the present case in reference to the weight of judicial authority, and fully conceding that there has not been an entire uniformity of the authorities as to the point now in issue, we have come to the opinion that, in a case like the present, of an instrument not negotiable, given in the form in which this is, the plaintiffs, the real parties in interest, may maintain an action thereon in their own name.

New trial ordered.

THE PRINCIPAL CASE AS IT AGAIN CAME BEFORE THE COURT is reported in *Eastern R. R. v. Benedict*, 10 Gray, 212, where a new trial was again ordered. The case was finally settled in *Eastern R. R. v. Benedict*, 16 Id. 289.

UNDISCLOSED PRINCIPAL MAY SUE OR BE SUED ON CONTRACT NOT UNDER SEAL MADE BY OR WITH AGENT: See *Naley v. Merriam*, 54 Am. Dec. 721, and note collecting prior cases; *Violett v. Powell's Adm'rs*, 52 Id. 548; *Ruis v. Norton*, 60 Id. 618, and note. The principal case is cited to this effect in *Larned v. Johns*, 9 Allen, 421; *Hunter v. Giddings*, 97 Mass. 44; *Byington v. Simpson*, 134 Id. 169; and see *Anderton v. Shoup*, 17 Ohio St. 128. But this is not permissible if the contract be negotiable paper: See *Larned v. Johns*, *supra*; *Williams v. Robbins*, 16 Gray, 80; see also *Bank of British North America v. Hooper*, *post*, p. 390. As to who may sue on negotiable paper payable to "agent," "cashier," "trustee," etc., see *Johnson v. Catlin*, 62 Am. Dec. 622, and note collecting prior cases in this series; *Pierce v. Robie*, 63 Id. 614. In *Barlow v. Congregational Society*, 8 Allen, 462, it is said, referring to the principal case, that whether those decisions which hold that on commercial paper payable to "A B, cashier," the bank, although not named in the instrument, might maintain an action, stand upon the peculiar relation between a bank and its cashier, or upon a general right of any principal to sue upon negotiable paper made to his agent, it was unnecessary to inquire. In the last case, page 461, it is also said, citing the principal case, that *Mann v. Chandler*, 9 Mass. 335, although never in terms overruled, has never been followed in Massachusetts, and can hardly be reconciled with the later decisions. A person, however, who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract, and consequently a promise made by one person to another, for the benefit of a third person, who is a stranger to the consideration, will not support an action by the latter: *Rogers v. Union Stone Co.*, 130 Mass. 583, distinguishing the principal case. The principal case was also distinguished in *Colburn v. Phillips*, 13 Gray, 67, in holding that an agent may also sue on a written agreement made by him in his own name in behalf of his principal. See further, on this last point in regard to the right of an agent to sue, *Elkins v. Boston & M. R. R.*, 51 Am. Dec. 184, and note collecting prior cases.

BANK OF BRITISH NORTH AMERICA v. HOOPER.

[5 GRAY, 557.]

PRINCIPAL IS NOT LIABLE ON BILL OF EXCHANGE DRAWN BY AGENT IN HIS OWN NAME, although it contains a direction to the drawee to charge the amount to the account of the principal.

BANK DISCOUNTING BILL DRAWN BY AGENT IN HIS OWN NAME, against a firm of which the principal was a member, and accepted by the firm in favor of another, by whom it was indorsed, cannot sustain a claim against the estate in insolvency of the principal individually, on account of an original indebtedness, independent of the bill, although the proceeds were applied to his use.

APPEAL from a decree of the master in chancery, in the matter of the estates of Horace Gray and Nathaniel Francis, insolvent debtors. The insolvents were partners, doing business in Boston under the firm name of Horace Gray & Co., in purchasing supplies and selling iron for several iron-works, one of which was the Pembroke Iron Works, at Pembroke, Maine. Gray became the owner of the Pembroke Iron Works, and employed Joseph Barrell as general agent and superintendent. Barrell was authorized to draw on Horace Gray & Co. for such sums of money as were needed in manufacture, and accordingly drew several drafts, as follows: "\$5,000. Pembroke, September 8, 1847. Three months from date, for value received of this first of exchange (second unpaid), please pay to the order of J. D. Andrews, esq., five thousand dollars, and charge the same to account of proprietors Pembroke Iron Works. Your humble servant, Joseph Barrell. To Messrs. Horace Gray & Co., Boston." These drafts were indorsed by Andrews, under an arrangement with Gray, by which Andrews was to receive a commission, and discounted by the Bank of British North America, which had been previously informed by Horace Gray & Co. that the firm would accept "the drafts of Mr. Joseph Barrell drawn for account of proprietors of Pembroke Iron Works." The proceeds of the drafts were received by Barrell, and applied to the expenses of manufacture at the iron-works. The drafts were accepted by Horace Gray & Co., and charged to "proprietors Pembroke Iron Works," but were protested for non-payment. Neither the drafts, nor the consideration thereof, were allowed to be proved against the individual estate of Gray.

A. H. Fiske, for the appellants.

S. Bartlett and C. B. Goodrich, for the appellees.

By Court, DEWEY, J. The consideration of the questions arising in the case of *Eastern Railroad v. Benedict*, 5 Gray, 561 [*ante*, 364], has led to a full examination of the adjudicated cases upon the question of the right of the principal, or real party in interest, to sue in his own name on a written promise made to his agent; and as connected therewith, the liability of the principal to be sued and charged in damages for the breach of a contract made by his agent.

To a certain extent we have found the law to authorize the introduction of oral evidence as to the parties in interest, and for the purpose of showing from whom the consideration moved, or for whose benefit the promise was made. The cases cited, and particularly the English cases, are very decisive in favor of the exercise of this right in cases of ordinary simple contracts, extending it, perhaps, somewhat further than we should feel authorized to do without modifying some of the views stated in *Stackpole v. Arnold*, 11 Mass. 27 [6 Am. Dec. 150], unless those remarks are to be considered as made peculiarly with reference to bills of exchange or negotiable promissory notes. While the recent English cases are found to be very strong in favor of the right to charge an unknown principal upon contracts made by his agent upon oral proof of who is the real party, yet there will be found to be a leading distinction taken between cases of commercial paper in the form of bills of exchange and negotiable promissory notes and other simple contracts, holding that no one but a party to such negotiable paper can be sued for the non-payment thereof: Byles on Bills, 5th ed., 26. Such is the doctrine of *Emly v. Lye*, 15 East, 7, where it was held that in the case of a bill of exchange drawn by one only, it was not competent to charge others as parties in interest, but that the liability was confined to the party who signed the instrument. In *Beckham v. Drake*, 9 Mee. & W. 92, where upon a written contract it was held that the real party in interest might be shown by oral evidence, the court distinctly except negotiable instruments from the application of the rule, Lord Abinger saying: "Cases of bills of exchange are quite different in principle. . . . By the law merchant, a chose in action is passed by indorsement, and each party who receives the bill is making a contract with the parties upon the face of it, and with no other party whatever."

The American cases will, we think, be found to maintain the same doctrine. *Pentz v. Stanton*, 10 Wend. 276 [25 Am. Dec. 558], is strong to this point. Our own case of *Stackpole v.*

Arnold, supra, was a direct application of this principle. That was a suit upon a negotiable note, and the defendant's name was not on the paper. The oral evidence offered was, however, full to the point that the person who signed the note was in fact the agent of the defendant, and that the note was given for the defendant's debt. But the court held that no action could be maintained on the note against the defendant. That case has ever been recognized, certainly to the extent of its application to negotiable paper, as the law of Massachusetts: *Bedford Commercial Ins. Co. v. Covell*, 8 Met. 443; *Tuber v. Cannon*, Id. 460. If sound, it meets the present case, and discharges the private estate of Horace Gray from all liability on the draft.

It is urged for the appellants that that case must be considered as overruled by the late case of *Huntington v. Knox*, 7 Cush. 371; and especially that it was in conflict with the principles stated by the court in the opinion given in that case. It is true that the court do there recognize and apparently fully indorse the case of *Higgins v. Senior*, 8 Mees. & W. 834; and taking the remarks of the court without reference to the case to which they were applied, they might seem to be somewhat at variance with the decision in *Stackpole v. Arnold, supra*. But the case of *Huntington v. Knox, supra*, was the case of a simple contract in writing in reference to the sale of goods. The agent of the plaintiff, in making a memorandum of the contract and giving a receipt for money paid on account of the same, had used his own name exclusively; but his agency being fully proved by oral evidence, and the interest of the plaintiff shown as the owner of the article sold, the question was whether the principal could maintain an action in his own name; and the court decided that he could, citing the case of *Higgins v. Senior, supra*, as a direct authority, as it was for the case of *Huntington v. Knox, supra*; for like that, it was an action upon a contract not negotiable. The adoption of the language of the court in the case of *Higgins v. Senior, supra*, as sound law, was certainly warranted for the purposes to which it was applied, but it ought not to be held as going further, much less as overruling *Stackpole v. Arnold, supra*, without any reference to it, or suggestion of that kind. It seems to us that the two cases may well stand together, applying the law as stated in each to its own peculiar facts.

We then recur to the contract in the present case, and find it to be a negotiable draft drawn by Joseph Barrell in his own name, without any indication that he is not the principal, and payable to a third person, who indorsed it to the appellants.

There is nothing in the margin or the heading of the draft that indicates any other principal than Barrell. There is no single circumstance on the face of the paper which in any way connects Horace Gray or the Pembroke Iron Works with the draft, unless it be the direction to the drawees to "charge the same to the account of Pembroke Iron Works." It has been argued that this direction indicates that the Pembroke Iron Works are the real drawers. But no such inference can be properly drawn from that circumstance. Bills are often drawn upon parties on funds of others distinct from the drawer, but with whom arrangements have been made to discharge such drafts.

It is further urged, on the part of the appellants, that the case of *Fuller v. Hooper*, 3 Gray, 334, furnishes a precedent for maintaining the present action. But in the view we take of the matter, the cases are widely different. It is true that in that case Horace Gray or the Pompton Iron Works were not named on the face of the bill as drawers; but it was drawn by "W. Burt, agent." But the form of signature indicated that it was in fact drawn in behalf of some other party; and had it been in the form of "H. Gray, by W. Burt, agent," or "Pompton Iron Works, by W. Burt, agent," no question could have arisen as to the party liable thereon. It was not as strong a case as that last supposed; but there was in the margin of the draft, which was apparently a business draft prepared to be used for the Pompton Iron Works, "Pompton Iron Works." An agency was thus fully disclosed on the face of the bill, and the only further inquiry was whether enough appeared to connect that agency with Horace Gray or the Pompton Iron Works. The court were of opinion that it was shown that the signature of Burt was the signature of an agent; and that the face of the bill indicated who the principal was.

But in the present case the signature is without any indication of agency, and nothing on the draft shows that it was drawn by the Pembroke Iron Works; there is no doubt that Joseph Barrell made himself personally responsible as drawee; and we are of opinion that the form of the signature and the nature of the instrument preclude the appellants, who discounted the bills upon the names borne upon them, being those of Joseph Barrell as drawer, J. D. Andrews as indorser, and Horace Gray & Co. as drawees and acceptors, from resorting to other parties not named thereon as parties.

Nor do the facts present a case sustaining a legal claim against the estate of Horace Gray individually, on account of an origi-

nal indebtedness independent of that upon the bill itself. It is a case of mere discount of a bill; and that a bill drawn upon a third party, and accepted by that party in favor of a fourth, by whom it was indorsed. There was no previous loan to Horace Gray, and no ground for setting up a previous indebtedness. Nor can the appellants maintain their claim upon the ground of an undisclosed principal, the character of the transaction being that of a discount of the paper upon the names borne upon it; and such being the original transaction, the appellants cannot go behind the paper and show that others received the benefit of the money paid for this bill.

Decree affirmed.

PRINCIPAL CANNOT SUE OR BE SUED ON NEGOTIABLE PAPER IF HIS NAME DOES NOT APPEAR THEREON: See *Eastern R. R. v. Benedict*, ante, p. 384. The principal case is cited to this proposition in *Bass v. O'Brien*, 12 Gray, 481; *Williams v. Robbins*, 16 Id. 80; *Slawson v. Loring*, 5 Allen, 342; *Barlow v. Congregational Society*, 8 Id. 461; *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 104; *Bartlett v. Tucker*, 104 Id. 339; *Anderton v. Shoup*, 17 Ohio St. 128. But a bank check having the words "Ætna Mills" printed in the margin, and signed "I. D. F., treasurer," is the check of the "Ætna Mills:" *Carpenter v. Farnsworth*, 106 Id. 562. The principal case is also cited, among others, in *Chandler v. Coe*, 54 N. H. 567, as holding or referring to the doctrine with approbation that an undisclosed principal cannot sue or be sued upon a written contract made by his agent in his own name, but that an action can be maintained upon an implied contract arising from the passage of the consideration.

OLD COLONY RAILROAD CORPORATION v. EVANS.

[6 GRAY, 25.]

VENDOR AS WELL AS VENDEE MAY INVOKE POWER OF COURT OF EQUITY to enforce specific performance of contract for the sale of land.

STATUTE OF FRAUDS IS SATISFIED BY WRITING SIGNED BY PARTY TO BE CHARGED, though not signed by the other party.

ONE MAY ENFORCE WRITTEN CONTRACT SIGNED BY DEFENDANT ALONE, though he himself might avoid liability, under such contract, by reason of the statute of frauds.

CONTRACT WITHIN STATUTE OF FRAUDS IS NOT OPEN TO OBJECTION OF WANT OF MUTUALITY, where the assent of both parties is shown, though the assent of only one party is in writing, and consequently the contract can be enforced against him alone.

MEASURE OF DAMAGES, IN ACTION AT LAW BY VENDOR FOR BREACH OF CONTRACT OF SALE OF LAND, is the difference between the contract price and the salable value of the land at the time of the breach.

VENDOR'S RIGHT TO SPECIFIC PERFORMANCE OF CONTRACT OF SALE OF LAND is not defeated on the ground that he has an adequate remedy at

law, since the measure of damages at law is not the contract price, but only the difference between this and the market value of the land at the time of the breach of the contract.

SPECIFIC PERFORMANCE WILL NOT BE DECREED IN CASES OF FRAUD, or of hard or unconscionable bargains, or where the decree would produce manifest injustice.

MUTUAL MISTAKE AS TO QUALITY OF LAND FROM WHICH DEFENDANT HAS UNDERTAKEN TO DIG GRAVEL for plaintiff's benefit is not ground for dismissing a bill for the specific performance of another and subsequent contract made after the defendant knew of the character of the land, and by which other land was substituted, and the defendant agreed to pay for the first land.

LAND DESCRIBED IN CONTRACT OF SALE AS "CERTAIN TRACT OF LAND CALLED MOUNT HOPE, containing about forty acres, situated on the southerly side of N. river," may be shown by the acts of the parties to include a tract of seventy acres known to the parties by that name.

CORPORATIONS MAY MAKE ALL CONTRACTS THAT ARE NECESSARY AND USEFUL to enable them to carry on the business or accomplish the objects of their incorporation.

RAILROAD CORPORATION MAY PURCHASE AND CONTRACT TO SELL LAND bought by it, so that gravel may be dug therefrom and carried over its road at an agreed freight, to be delivered to and used by a third person.

BILL for specific performance of contract for sale of land, and containing allegations as follows: The defendant Evans contracted with the city of Boston to furnish a large quantity of gravel to the city, and entered into a written contract with the plaintiffs, under which the plaintiffs were to purchase "a certain tract of land called Mount Hope, containing about forty acres, situated on the southerly side of the Neponset river, in Quincy," and the defendant was to take gravel from this place and transport it to Boston over the road of plaintiffs, at an agreed rate or toll. According to this agreement, the plaintiffs bought the tract of land called Mount Hope, taking two deeds, one for fifty-eight acres and the other for eleven acres; and afterwards sold about ten acres of the tract to N. Ward & Co., and built a branch road over another part. The defendant took gravel from Mount Hope under the contract, until he became dissatisfied with the quality of the gravel there, and then made the following proposition to the plaintiffs in writing: "Boston, March 18, 1849. To the directors of the Old Colony Railroad Corporation. Gentlemen: Being desirous to resume, as soon as may be, the delivery of gravel to the city, I propose to you to put on a gravel train forthwith between your old gravel pit on the east side of your main track in Quincy and the neck lands in Boston, on the following terms, viz. [certain terms are then enumerated, immaterial to this statement]. And I further propose to you,

that if you will purchase or hire the Taylor farm in Quincy, where three shafts have been sunk this week, and lay a turnout to such farm from the main line, I will accept the same as a substitute for Mount Hope, and will pay to you the cost of Mount Hope in three annual installments with interest, deducting the portion included in the location of the branch railroad and the portion sold; and I will give security for such purchase; and the company to give me the benefit of the advance paid by N. Ward & Co. Wm. Evans." It was then alleged that the plaintiffs accepted this proposition and gave the defendant notice of such acceptance, and the plaintiffs purchased the Taylor farm and laid a turnout to it, and the defendant accepted this farm as a substitute for Mount Hope, ceased work there and began work at Taylor farm, and had since continued working there; that the plaintiffs had a deed prepared and executed, by which all the tract of land called Mount Hope was conveyed to the defendant, except the part sold and that covered by the road location, and tendered this deed to the defendant and demanded of him that he secure to the plaintiffs the payment pursuant to the terms of of the above proposition, of the amount which the plaintiffs had paid for this tract, to wit, seventeen thousand and forty-two dollars and fifty-six cents; and that the defendant, acting upon the advice of counsel, refused to accept the deed. The defendant answered that he made the first contract without any special examination to see whether Mount Hope consisted of gravel or not, with only a general knowledge of the place, without any knowledge of its exact boundaries, and believing that it contained just about the amount of forty acres, as specified in the contract; that he was induced by the misrepresentations of the plaintiffs' superintendent to suppose that the hill was gravel, and did not contract to take anything besides gravel, or to take the hazard of the place proving to be anything besides gravel. The defendant admitted that he acted for a time under that contract, but averred that as the hill proved not to consist of gravel he was put to an expenditure greater, as he believes, than the cost of the place; and that by reason of being so misled by the plaintiffs, he had been compelled to abandon a contract for the delivery of gravel made by him with the city of Boston. He admitted the proposition made by him to the plaintiffs, but averred that at that time he did not know, and did not believe that the plaintiffs knew, by the name of Mount Hope, any tract such as the plaintiffs now alleged, but considered that Mount Hope consisted of about forty acres; that he was told by the plaintiffs' president that

under the contract he was obliged to remove Mount Hope, whether it was gravel or not, and that he made the proposition at the president's office, without any opportunity of consulting counsel; that the proposal was never accepted by the plaintiffs, and that he had received no notice of such acceptance; and that the plaintiffs had not signed any writing whereby they were bound to convey the lands in question to him. He claimed that the plaintiffs had no right to relief in equity, as it had an ample remedy at law. A general replication was filed by the plaintiffs. At the trial, evidence was introduced upon the various controverted points, the results of which sufficiently appear in the opinion.

S. Bartlett and D. Thaxter, for the plaintiffs.

O. G. Loring and C. M. Ellis, for the defendant.

By Court, DEWEY, J. 1. The general power of a court of chancery to compel the performance of specific contracts is unquestionable. It is clearly recognized in the elementary books and in the reported cases. It is directly given to this court by the revised statutes, c. 81, sec. 8, in "all suits for the specific performance of any written contract, where there is not a plain and adequate remedy at law."

A recurrence to the books of authority on this subject will also fully show that the power of this court may be invoked in this respect as well in behalf of the vendor of real estate as of the vendee; and in all proper cases the vendor may therefore come to this court and obtain a decree in his behalf against his vendee for the execution of a written contract made by the latter to purchase real estate. The English cases are abundant to that effect. But what is more directly an authority for this court, our own decisions show the repeated exercise of this power: *Salisbury v. v. Bigelow*, 20 Pick. 174; *Haven v. City of Lowell*, 5 Met. 35; *Hilliard v. Allen*, 4 Cush. 532. There may be open to the vendee a broader ground of defense against such a bill than would ordinarily arise in the case of a vendee seeking to compel a conveyance by the vendor; but in the absence of any good defense, the vendee is alike amenable to this process.

2. The next inquiry is as to the nature of the contract in the present case, and whether there is such want of mutuality in it that the bill should be dismissed on that ground. The defendant relies upon the position that unless both parties were so bound by the agreement that each could enforce it against the other by a proceeding at law or in equity, there is no valid

agreement upon which a specific performance can properly be decreed. This contract now sought to be enforced, it is conceded, was only signed by the defendant. If that fact shows such a want of mutuality as forbids maintaining this bill, then the bill must be dismissed. The defendant insists that such is the effect, and relies upon the following cases: *Benedict v. Lynch*, 1 Johns. Ch. 370 [7 Am. Dec. 484]; *Geiger v. Green*, 4 Gill, 472; *Lawrenson v. Butler*, 1 Sch. & Lef. 13.

If this written instrument signed by the defendant were to be considered in no other light than as a mere proposition to the plaintiffs, not acted upon by them and not accepted, then clearly there would be no binding contract. But such is not the case, the evidence showing clearly that upon the execution of this writing by the defendant, the plaintiffs, agreeably to the terms and conditions therein stated, proceeded to hire the Taylor farm for the term of seven years, with the right to take gravel there, paying for the use of the land for that purpose ten thousand eight hundred dollars; that they permitted the defendant to use for a time the old gravel pit, and then to take gravel from the Taylor farm. The plaintiffs therefore acted upon this promise of the defendant, and made large expenditures in performing the conditions and stipulations on their part to be performed as conditions precedent to the performance of the agreement on the part of the defendant. And the plaintiffs' acceptance of the proposal was known to the defendant, and he went into the occupation of the Taylor farm. [Here the judge referred in detail to those portions of the evidence upon which these conclusions were based.]

We do not understand that it is essential to the validity of a contract, required by the statute of frauds to be in writing and signed by the party, that each party should be alike bound to the performance of the contract by his written signature thereto. The statute itself only requires that "the promise, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith:" R. S., c. 74, sec. 1. The cases cited by the defendant certainly hold a different language, and, if good authority, would maintain his position. The case of *Lawrenson v. Butler*, *supra*, affirms that view strongly, as does also *Geiger v. Green*, *supra*. These cases, and that of *Benedict v. Lynch*, *supra*, apparently of like bearing, have led us necessarily to a pretty full examination of the authorities upon this point.

In Chitty on Contracts, 8th Am. ed., 4, note, it is said "that

a party may sue on a contract, although it be void as against himself for want of his signature, under the statute of frauds." The reason is more fully stated in the text as this: that the signature is prescribed rather as necessary evidence of the contract than as an essential or constituent part of the engagement itself. On page 17 of the same work, after stating that the assent must be mutual, and the agreement must in general be obligatory upon both parties, or it will bind neither, yet it is added: "A contract may not bind one party in consequence of his omitting to sign it according to the statute of frauds; and yet he may sue the other party who has complied with the act; for, in this case, the objection merely goes to the evidence of the agreement." Again, more directly, on page 355: "It is sufficient that the defendant, whether he be the vendor or the vendee, has signed the contract, and it is no objection that he has no remedy thereon against the plaintiff, inasmuch as the latter has not signed it." 2 Stark. Ev., 4th Am. ed., 614, and Roberts on Frauds, 124, state the same rule.

The weight of authority from adjudicated cases will be found fully to sustain the doctrine thus stated. *Egerton v. Matthews*, 6 East, 307, is to that effect. In *Allen v. Bennett*, 3 Taunt. 176, Mansfield, C. J., said: "Every one knows it is the daily practice of the court of chancery to establish contracts signed by one person only." *Douglass v. Spears*, 2 Nott & M. 207 [10 Am. Dec. 588], holds the same doctrine. The case of *Penniman v. Hartshorn*, 13 Mass. 91, is directly to the point that both parties need not be bound in writing. Parker, C. J., says: "The bargain was undoubtedly mutual, although the parties might not have been equally vigilant in obtaining the legal written evidence to prove it." *Barstow v. Gray*, 3 Me. 415, holds it sufficient if signed by the party sought to be charged. But the case of *Clason v. Bailey*, 14 Johns. 484, is more particularly to be referred to as containing a very full examination of the authorities upon this question by Chancellor Kent, in which he says the point is now too well settled to be further questioned, though his earlier impressions were otherwise. He also states that the then lord chancellor of Ireland, Lord Manners, had not followed the opinion of Lord Redesdale in *Lawrenson v. Butler*, 1 Sch. & Lef. 18; but held the contrary, as will be seen in *Ormond v. Anderson*, 2 Ball & B. 370. It seems quite unnecessary to pursue the inquiry further; and we will only add the cases of *McCrea v. Purmont*, 16 Wend. 460 [30 Am. Dec. 103], and *In re Hunter*, 1 Edw. Ch. 5, as fully confirming the views of Chan-

cellor Kent, and showing the decisions of the courts of New York upon this question.

The result is, therefore, that there may be a mutual contract, to which both parties have given their assent, though the evidence of such assent may exist in a different form as regards the two parties; that as to one it may be verbal, while the other's is expressed by his signature in writing; and that the latter may be bound to perform his contract, while the first party might avoid his by reason of the statute of frauds.

3. The next inquiry is, whether there exists, in a case like the present, such plain and adequate remedy at law as to oust this court of jurisdiction as a court of equity.

No doubt a remedy exists at law for breach of a contract to purchase real estate. The only doubt is as to the extent and perfectness of the remedy. It is said, on the part of the defendant, to be fully adequate, because all that is or can be sought by the plaintiffs is the payment of money, and courts of law can render judgment for the full damages in money. The reply to this part of the defense must depend upon the view we take of the rule of damages in an action at law on such a contract. If it be held, as is supposed by the counsel for the defendant, that the vendee is to be charged with the whole amount of the purchase money in an action at law, if he refuses to perform such a contract, the result as to the damages would be the same as in proceedings in equity. But we apprehend that that rule of damages, however applicable it may be to cases of contracts for the sale of personal property, where by force and effect of a mere delivery, or by a judgment at law for the value of an article, the property may become vested in the party paying damages therefor, does not apply to real estate, which can only be transferred by deed. In actions against a vendee on a contract for the purchase of real estate, we had supposed it to be a well-settled rule that when a party agreed to purchase real estate at a certain stipulated price, and subsequently refuses to perform his contract, the loss in the bargain constitutes the measure of damages, and that is the difference between the price fixed in the contract and the salable value of the land at the time the contract was to be executed.

The examination of the authorities upon this subject does not show an entire uniformity of views. The rule we have stated is said by Mr. Sedgwick to be the English rule: *Sedgwick on Damages*, 2d ed., 190; see *Laird v. Pim*, 7 Mee. & W. 474, where this subject is much discussed. In *Alna v. Plummer*, 4 Me.

258, which was a contract for the sale of a pew in a meeting-house, it was held that upon a tender of a deed the vendor might recover the full price, though the other party refused to accept the same. The question was, however, apparently very little discussed. In some of the New York cases, as in *Franchot v. Leach*, 5 Cow. 506, it seems to be assumed that the vendor would recover the whole price agreed to be paid, if he was ready to fulfill the contract on his part. The English rule seems to be recognized in *Sawyer v. McIntyre*, 18 Vt. 27.

Several cases from our own reports are relied upon by the defendant as sustaining the position that relief, in a case like the present, should be sought solely in a court of law.

The case of *Sears v. City of Boston*, 16 Pick. 357, arose upon a contract in which the defendants agreed to remove a bank of gravel from the land of the plaintiff, and pay him therefor at the rate of one dollar a square. The contract was only partially performed, and plaintiff brought his bill for a specific performance. Certain difficulties arose, preventing the performance of the work in the manner anticipated, and the defense was principally put upon a change of circumstances; and the court held that the specific performance of a contract was not to be enforced, "where, through inadvertence or mistake, or by the intervention of unforeseen causes, the performance becomes impossible or unreasonable." Although the court remark, in the opinion in that case, that "if the plaintiff had sustained any damages by the non-completion of the contract, it might be fully compensated in damages," yet they do not intimate that those damages would be the entire sum agreed to be paid for the gravel.

The case of *Gill v. Bicknell*, 2 Cush. 358, more distinctly sustains the position that in case of the tender of a deed by one party, and a refusal by the other to receive it, the measure of damages would be the money stipulated to be paid for the land; and thus the party would have an adequate remedy at law in such cases. This was said, however, in a case where the court had already stated that the bill in equity could not be maintained for the reason that no written contract had ever been executed by the defendant.

The case of *Jacobs v. Peterborough etc. R. R. Co.*, 8 Cush. 223, was much to the same effect, and the suggestion was there made under similar circumstances as in the case last cited. The court there also had announced the opinion that the case failed to show that the defendant had ever signed any contract agree-

ing to purchase the land. Having done so, they stated as a further objection that the remedy at law would be complete, as the agreed price might be recovered in an action at law. In neither of these two last cases was this question essential to the decision.

Upon more full consideration of the question of the measure of damages in an action at law, where the defendant has refused to receive the deed tendered him, the court are of opinion that the proper rule of damages in such a case is the difference between the price agreed to be paid for the land and the salable value of the land at the time the contract was broken.

4. It is next insisted that the plaintiffs should not maintain this bill for a specific performance of the written contract, because it would be inequitable. This is a good ground of defense; for courts of equity will not decree a specific performance in cases of fraud, or of hard or unconscionable bargains, or where the decree would produce manifest injustice: 1 Story Eq. Jur., sec. 769. But "where a contract respecting real property is in its nature and circumstances unobjectionable, it is as much a matter of course for a court of equity to decree a specific performance of it as it is for a court of law to give damages for the breach of it:" *Id.*, sec. 751. The objection being open to the defendant that the specific performance would be inequitable as respects him, it is incumbent on him to establish that fact. We therefore recur to his specifications relied upon to sustain such defense.

It is said that the parties were under a mistake as to the material to be found at Mount Hope; that the original agreement assumed that the hill was gravel. But it was a case of mutual mistake; and whatever excuse this mistake might have furnished for the defendant, if the plaintiffs had attempted to compel him to perform his contract to take gravel from Mount Hope, it is difficult to perceive how that can affect the present suit, seeking the specific performance of another and subsequent contract made after the defendant well knew the real character of the material to be found on Mount Hope. The case discloses the fact that the defendant had ceased operations upon Mount Hope before he made the written proposal to them of March 18, 1849, stipulating to take Mount Hope off their hands if they would hire the Taylor farm for him, with the right to take gravel therefrom.

Nor do we see any ground for the suggestion that the plaintiffs took advantage of the defendant's position by reason

of his investment in cars; and of his contract with the city of Boston. The defendant deemed it for his interest to make this new arrangement, and the plaintiffs, upon the faith of his agreement, procured the Taylor farm for his operations, thus enabling him to resume his operations, and to fulfill his contract with the city of Boston.

The only real question for consideration upon this part of the case is that as to the alleged misunderstanding of the defendant in reference to that stipulation in the contract, in which the defendant agrees to pay the plaintiffs "the cost of Mount Hope in three annual installments, deducting the portion included in the location of the branch railroad and the portion sold." On the part of the defendant, it is insisted that the "Mount Hope" which he agreed to pay for was about forty acres, and that from this was to be deducted what had been sold to N. Ward & Co., whereas the plaintiffs required him to take and pay for about sixty acres. If the facts had disclosed a case of clear mistake on the part of the defendant as to this, without any laches on his part, it would be a ground, certainly, for refusing the aid of this court to compel the execution of the contract. In recurring to the original agreement made between these parties on the fourteenth of January, 1848, it appears that they describe it as "a certain tract of land called Mount Hope, containing about forty acres, situated on the southerly side of Neponset river, in Quincy." The description, it will be seen, was very general. The conveyances to the plaintiffs were made on the eighth and tenth of April following, giving particular boundaries, and the whole containing about sixty-nine acres. The defendant in his answer states that he had only a general knowledge of the place, did not know its exact boundaries, and "was in the belief that it contained just about forty acres." In the answer of the defendant, he admits "that he believes it true that the plaintiffs did purchase a tract of land which he knew as Mount Hope," although he afterward says he did not know that there were several purchases, and was informed that it contained about forty acres. His written stipulation was "to pay the cost of Mount Hope," evidently embracing in terms the purchase of the plaintiffs. But Mount Hope, as the defendant now describes it, would not embrace either of the purchases by the plaintiffs.

[Here the judge recapitulated the evidence, which, in the opinion of the court, proved that the whole of the land included in the two deeds to the plaintiffs was known by the defendant before his proposal of March 19, 1849, as "Mount Hope," or "Mount Hope farm."]

Now, however the precise limits of Mount Hope may have been in the view of others, the more material question is, How was it understood by these parties in the contract of March 18, 1849? See *Gerrish v. Towne*, 3 Gray, 82. Was it not the Mount Hope as purchased by the plaintiffs for the purpose of furnishing gravel to be taken away by the defendant? Does not the language of the contract point to the entire purchase by the plaintiffs, rather than to any particular locality of a high hill? The proposition was to pay to the plaintiffs the cost of Mount Hope—the entire cost of their expenditure in this respect. We think it must have been so understood. The defendant was familiar with the general locality. He had taken gravel from both parcels; from that included in the deed of April 10th as well as the other. He had sufficient opportunity to have known the exact extent of the plaintiffs' purchase; and agreeing, as he did, to take this purchase off their hands and assume it himself if they would purchase the Taylor farm, he must be bound thereby. It was, as we think, the Mount Hope as purchased by the plaintiffs that the defendant was to pay for at its cost, deducting the sale to Ward & Co. The defendant has not, therefore, shown any sufficient ground for excusing the non-performance of his contract, by reason of any fraud or mistake.

5. Another objection taken to the maintenance of this bill was the want of corporate capacity to purchase and sell lands. The very general powers which, under the principles of the common law, would attach to corporations, are much restricted by our special charters, or acts of incorporation for special purposes. We are to look at the nature and object of the incorporation, and determine, in the absence of any particular limitation, what are the incidental powers. Corporations clearly have power to make all contracts that are necessary and useful to enable them to carry on the business, or accomplish the objects of their incorporation. The purchase of the land, the subject of the present bill, seems to have been made as a means of promoting the purposes of their incorporation—the increasing of their business in transportation upon their railroad—and not as an object of trade or speculation in lands. We do not see any legal objection to the maintenance of the bill on this ground: See Angell & Ames on Corp., secs. 10, 11, 151, 153.

Plaintiffs entitled to specific performance.

VENDOR MAY HAVE SPECIFIC PERFORMANCE OF CONTRACT TO CONVEY: *Andrews v. Sullivan*, 43 Am. Dec. 53, note 57; see *Printup v. Mitchell*, 63 Id. 258.

SPECIFIC PERFORMANCE IS WITHIN SOUND DISCRETION OF COURT, and is not a matter of right: *Young v. Daniels*, 68 Am. Dec. 477, and note 485, citing prior cases.

SPECIFIC PERFORMANCE WILL NOT BE DECREED IN CASES OF FRAUD OR MISTAKE, or of hard and unreasonable bargains, or where the decree would produce injustice or prove inequitable: *Trigg v. Read*, 42 Am. Dec. 447; *Frisby v. Ballance*, 39 Id. 400; *Patterson v. Martin*, 34 Id. 474, and notes. The principal case is cited to the point that specific performance will not be decreed where there appears to have been a material mistake of facts: *Boynston v. Hazelboom*, 14 Allen, 109.

OBJECTION OF EXISTENCE OF ADEQUATE REMEDY AT LAW does not apply to a bill for the specific performance of a contract for the sale of land: *Park v. Johnson*, 4 Allen, 261; *Jones v. Newhall*, 115 Mass. 248, citing the principal case to this effect; see, upon this point, *Buck v. Sweeney*, 56 Am. Dec. 681; *Andrews v. Sullivan*, 43 Id. 53.

SPECIFIC PERFORMANCE WILL NOT BE ENFORCED WHEN REMEDY IS NOT MUTUAL or one party only is bound by the agreement: *De Cordova v. Smith*, 58 Am. Dec. 136; *Bodine v. Glading*, 59 Id. 749. But see *Kerr v. Day*, 53 Id. 526; *Rogers v. Saunders*, 33 Id. 635.

MEASURE OF DAMAGES FOR BREACH OF AGREEMENT TO PURCHASE land is the difference between the contract price and the value of the land at the time of the breach: *Boston & Maine R. R. v. Bartlett*, 10 Gray, 386; *Sandborn v. Chamberlin*, 101 Mass. 418; *Griswold v. Sabin*, 51 N. H. 170; *Pittsburgh etc. R'y v. Heck*, 50 Ind. 306, all citing the principal case to this effect. For the measure of damages for a breach of agreement to convey, see *Shaw v. Wilkins*, 49 Am. Dec. 692, and note 697; see also *Martin v. Atkinson*, 50 Id. 403.

WORDS "MORE OR LESS" EXCLUDE IDEA THAT SELLER INTENDED TO BIND HIMSELF that the actual quantity of the land should correspond to the estimate: *Jones v. Plater*, 41 Am. Dec. 408; see also *Fauve v. Martin*, 57 Id. 515, and note 519.

CONTRACT SIGNED BY VENDOR ALONE SUFFICIENT TO SATISFY STATUTE OF FRAUDS and to enable vendee accepting the contract to enforce it: *Worrall v. Mass*, 55 Am. Dec. 330, and note 344. The principal case is cited to the point that to satisfy statute of frauds the signature of the party to be charged alone need be affixed to the writing: *Dresel v. Jordan*, 104 Mass. 412; *Slater v. Smith*, 117 Id. 98.

ACCEPTANCE AND ACTS BY ONE PARTY UNDER PROPOSAL MADE BY ANOTHER PARTY makes the proposal binding and irrevocable: *Bell v. City of Boston*, 101 Mass. 510, citing the principal case on this point. Notice of the acceptance of a proposal completes the contract: *Willard v. Tayloe*, 8 Wall. 565, citing the principal case.

INCIDENTAL POWERS OF CORPORATION: See *State v. Commissioners*, 57 Am. Dec. 409, and note citing prior cases 414; to take and hold land: Id. The case of *Davis v. Old Colony R. R.*, 131 Mass. 272, approves the ruling of the court in the principal case, that the corporation was not estopped from recovery because of the objection that it was dealing outside of its franchise in buying and selling the gravel lands, but draws a distinction when the corporation is defendant, on the ground that in the latter case, to enforce an *ultra vires* agreement against a corporation is to compel an unauthorized application of its funds, but in the former case the enforcement of the individual's contract restores into the corporate treasury misapplied funds.

LUCAS v. NEW BEDFORD & TAUNTON R. R. Co.

[6 GRAY, 84.]

BURDEN OF PROOF WHERE PERSON, NOT PASSENGER, IS INJURED BY PASSENGER CARRIER is upon such person to show that he exercised due care, and that the carrier was guilty of negligence, which was the cause of the injury.

PASSENGER CARRIER NEED EXERCISE ONLY ORDINARY CARE TOWARD ONE WHO ENTERS CARS NOT AS PASSENGER, but to assist an aged and infirm relative to a seat, and is not bound to give such person any special notice of the time of the departure of the train.

ONE ENTERING CARS OF PASSENGER CARRIER, NOT AS PASSENGER, but to accompany infirm relative to a seat as a passenger, cannot recover for injuries received in leaving the cars, if he attempted to leave the cars after the train was started, or finding the cars in motion as he was going out, persisted in making progress to get out, and if such attempt was the cause of or contributed to the accident, even though there was negligence in the carrier in moving the train and in a jerk occurring after the starting, which concurred in producing the injury.

FACT THAT PERSON IS IN EXCITING AND ALARMING SITUATION AT TIME OF INJURY will not reduce the degree of care requisite for him to exhibit to avoid the injury, if he is in such situation wrongfully, or because of his own negligence.

PLAINTIFF, THOUGH THERE MAY HAVE BEEN NEGLIGENCE ON HIS PART, MAY RECOVER, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendants' negligence.

ERRORS OR OMISSIONS NOT PREJUDICIAL ARE NOT GROUND FOR NEW TRIAL.

ACTION of tort by plaintiff and wife, and after her death prosecuted by him alone upon taking out letters of administration. It was alleged that an aunt of Mrs. Lucas bought of the defendants a ticket from New Bedford to Taunton; that because of her age, infirmity, and illness, she was unable to enter the cars and take a seat without assistance; that the defendants and their servants neglected to render this assistance, and Mrs. Lucas, in order to give this aid, entered the cars with her aunt, and without unnecessary delay attempted to leave the cars, whereupon the cars were suddenly and violently, without notice and negligently, started, whereby Mrs. Lucas was thrown from the platform of the car under the wheels, and her arm and leg severed from her body. The answer put these facts in issue, and averred that the defendants had no notice that the aunt of Mrs. Lucas needed assistance in entering the cars, denied that Mrs. Lucas was lawfully in the cars or legally entitled to notice of the starting of the train, and averred that if she was so entitled she was sufficiently notified, and did not attempt to leave the car upon such notice, but neglected to do so until the train was in motion,

and then recklessly jumped from the car. There was evidence of a jerk given by the engine to the train after starting. But the evidence was conflicting as to whether Mrs. Lucas was thrown from the platform by this jerk or jumped from the platform. The evidence was conflicting upon other points. But it was admitted that she went out of the door of the car and on to the platform after the cars had begun to move. After the close of the evidence the presiding judge suggested to the parties certain instructions to the jury. To these instructions the plaintiff excepted. A verdict was by consent taken for the defendants, and the case reported to the whole court. The instructions upon which the opinion is based are sufficiently stated in the opinion.

S. Bartlett, for the plaintiff.

J. H. Clifford, for the defendants.

By Court, *MERCALF*, J. 1. The ruling that the burden of proof was on the plaintiff to show that Mrs. Lucas exercised due care, that the defendants were guilty of negligence, and that such negligence was the cause of her injury, was undoubtedly correct: See *Lane v. Crombie*, 12 Pick. 177; *Holbrook v. Utica & Schenectady R. R. Co.*, 12 N. Y. 236 [64 Am. Dec. 502]. Indeed, its correctness has not been questioned by the plaintiff's counsel.

2. And we think it perfectly clear that Mrs. Lucas, at the time of the injury, did not sustain such a relation to the defendants as imposed on them any extraordinary care; that they were not bound to give her special notice of the time of the departure of the train; and that if they exercised ordinary care it was the most that the law exacted of them. In *Lygo v. Newbold*, 9 Exch. 302, the plaintiff, without the defendant's authority, but by permission of the defendant's servant, rode in a cart with her goods, which the defendant had contracted to carry for her. The cart, being insecure, broke down, and the plaintiff was injured. The court held that the defendant was not liable for that injury, the plaintiff not being rightfully in the cart.

3. The chief question made by this plaintiff is whether the law was rightly stated in the two following rulings which the judge proposed to make: 1. That if Mrs. Lucas attempted to leave the cars after the train was started, or finding the cars in motion as she was going out, persisted in making progress to get out, and such attempt was the cause of or contributed in any degree to the accident, the plaintiff could not recover;

2. That though there was negligence of the defendants in moving the train, and in the jerk occurring after the first starting of the train, the defendants would not be liable if such jerk and the want of due care on the part of Mrs. Lucas in attempting to step from the car combined to produce the injury.

It is objected to the first of these rulings that it assumed what should have been left to the jury, that Mrs. Lucas was not entitled to special notice of the starting of the train. We have already disposed of this objection, by deciding that she was not entitled to such notice. It is further objected that the effect of this was that Mrs. Lucas was wanting in ordinary care in not leaving the cars before the time of their starting. But this was not its precise effect. Its effect was that she was wanting in ordinary care in attempting to leave the cars when they were in motion. And of this it is impossible for us to entertain a doubt.

It is objected to the second ruling that it held Mrs. Lucas, who was placed in an exciting and alarming situation by the defendants' wrong conduct, bound to exercise the usual degree of care which the law otherwise requires, that is, ordinary care. And it has been sometimes held that the rule respecting the exercise of ordinary care by a plaintiff does not apply to persons incapable of exercising it; as in the instance of young children. The cases *Lynch v. Nurdin*, 1 Ad. & El., N. S., 29, and *Robinson v. Cone*, 22 Vt. 213 [54 Am. Dec. 67], cited by the counsel for the plaintiff, were of that kind, and do not support this action. In the other case cited by him, *Chaplin v. Hawes*, 3 Car. & P. 554, the injury was caused by the collision of the carriages of A and B. Chief Justice Best held that A might recover of B, whose carriage was where it ought not to have been and where A's might rightfully have been, though A might have avoided the injury by stopping or turning aside. The ground on which the judge proceeded was, that the meeting of the parties was sudden, and "on the sudden a man may not be sufficiently self-possessed to know in what way to decide; and in such a case the wrong-doer is the party who is to be answerable for the mischief, though it might have been prevented by the other party's acting differently." But that case is not like this. In that case A was where he had a right to be when the danger first appeared; but in the present case, Mrs. Lucas, when the train started and when the jerk occurred, was where she had no right to be. And conduct which the law requires of those who wrongfully bring themselves into an emergency is not to be measured

by that which the law excuses in those who are wrongfully brought into an emergency by others.

The other objection to the second ruling, that it left to Mrs. Lucas no *locus pœnitentiæ*, is to be answered in the same manner as the first objection. She was in the wrong from the beginning. The exceptions state that "she went out of the door of the car on to the platform after the cars had begun to move."

No other objection was taken, in argument, to the foregoing two rulings at the trial. And we find that they conformed to the rule of law laid down in numerous cases: See *Parker v. Adams*, 12 Met. 415, and other cases cited in Angell on Carriers, secs. 556-566. More recent decisions have modified the rule, so that it is now expressed thus: Though there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendants' negligence, he is entitled to recover: *Bridge v. Grand Junction Railway*, 3 Mee. & W. 248; *Davies v. Mann*, 10 Id. 549; *Thorogood v. Bryan*, 8 C. B. 115; *Clayards v. Dethick*, 12 Ad. & El., N. S., 439; *Moore v. Central Railroad*, 24 N. J. L. 268. It has therefore occurred to us to inquire whether the rule ought not to have been expressed by the judge in its modified form. And we are of the opinion that if, in strictness, it ought to have been (of which we express no opinion), yet that the plaintiff could not have availed himself of this objection if he had thought fit to make it; because the evidence showed conclusively that Mrs. Lucas, by exercising ordinary care, that is, by remaining in the car, might have avoided the consequences of the defendants' negligence. The verdict, therefore, could not have been for the plaintiff, if the rule had been stated in its modified form. And when a party to a suit cannot have suffered by an error or an omission in the ruling of the court, he cannot have a new trial because of such error or omission. Judgment on the verdict for the defendants.

ERRORS NOT PREJUDICIAL NOT GROUND FOR REVERSAL: *Latterell v. Cook*, 63 Am. Dec. 428, and cases cited in the note 434.

BURDEN OF PROOF WHEN PASSENGER IS INJURED: Note to *Furish v. Reigle*, 62 Am. Dec. 679-686. Burden of proof as to contributory negligence in such cases: Id. 686-688.

CONTRIBUTORY NEGLIGENCE.—A railroad company is not liable to a passenger for an injury which he might have avoided by ordinary attention to his own safety, though the negligence of their agents also contributed to the accident. Rule applied where a passenger jumped from a moving train to

avoid being negligently carried beyond his place of destination: *Pennsylvania R. R. Co. v. Aspell*, 62 Am. Dec. 323; and see authorities collected in the note to this case upon the subject of contributory negligence; see also *Galena etc. R. R. Co. v. Fay*, 63 Id. 323, and the note 333. Carelessness or neglect on the part of one party will not excuse the want of ordinary care on the part the other: *Steamboat Farmer v. McCraw*, 62 Id. 718. Where the negligence of both parties is contemporaneous, the plaintiff cannot recover if by due care on his part he might have avoided the injury: *Murphy v. Deane*, 101 Mass. 466, citing the principal case to this point. When one voluntarily puts himself in a place of exposure to injury, without some reason of necessity or propriety to justify him in so doing, and injury happens to him in consequence of his being in that place, he is not allowed to recover for such injury, although he may be able to show negligence in the conduct of the other party: *Mayo v. Boston & Maine R. R.*, 104 Id. 141, citing the principal case.

STANDING ON PLATFORM OF TRAIN IS CONTRIBUTORY NEGLIGENCE: Note to *Ingalls v. Bills*, 43 Am. Dec. 366; *Zemp v. Wilmington etc. R. R. Co.*, 64 Id. 763. The principal case is cited to this effect in *Hickey v. Boston etc. R. R. Co.*, 14 Allen, 433. So, of attempting to alight from a train in motion: Note to *Ingalls v. Bills*, 43 Am. Dec. 364. The principal case is cited to this effect in *Gavett v. Manchester etc. R. R. Co.*, 16 Gray, 507.

ERROR IN JUDGMENT IN TRYING TO ESCAPE FROM IMMINENT DANGER will not constitute contributory negligence, when: See note to *Freer v. Cameron*, 55 Am. Dec. 674 et seq.; *Galena etc. R. R. Co. v. Fay*, 63 Id. 324; *Ingalls v. Bills*, 43 Id. 346.

BURDEN OF PROOF OF CONTRIBUTORY NEGLIGENCE: See note to *Furish v. Reigle*, 62 Am. Dec. 686-688. The principal case is cited to the point that the court may say, as a matter of law, that the evidence is insufficient in law to prove that the plaintiff exercised ordinary care: *Messel v. Lynn etc. R. R. Co.*, 8 Allen, 236; and in the case of undisputed facts should so instruct the jury: *Brooks v. Somerville*, 106 Mass. 275; *Gavett v. Manchester etc. R. R. Co.*, 16 Gray, 507; *Gahagan v. Boston etc. R. R. Co.*, 1 Allen, 190; *Todd v. Old Colony etc. R. R. Co.*, 3 Id. 22; *Snow v. Housatonic etc. R. R. Co.*, 8 Id. 443. Where a plaintiff who seeks to recover compensation for an injury occasioned by the carelessness of another offers no evidence that he was himself in the exercise of care, but, on the contrary, the whole evidence on which his case rests shows that he was careless, the court may rightfully instruct that as a matter of law the action cannot be maintained: *Gahagan v. Boston etc. R. R. Co.*, 1 Id. 190; *Todd v. Old Colony etc. R. R. Co.*, 3 Id. 22; *Wright v. Malden etc. R. R. Co.*, 4 Id. 289; *Warren v. Fitchburg etc. R. R. Co.*, 8 Id. 230, all citing the principal case. In *Sheff v. City of Huntington*, 16 W. Va. 315, it is held that contributory negligence is a matter of defense, and that the burden of proof thereof is upon the defendant, citing the principal case as one of the authorities taking a contrary view.

HALE v. MECHANICS' MUTUAL FIRE INS. CO.

[6 GRAY, 169.]

ASSIGNEE, WITH INSURERS' CONSENT, of interest of one to whom policy is payable becomes entitled to whatever those originally insured may be entitled to receive in case of loss; but he does not acquire the full rights of an assignee of a chose in action, but recovers in the right of the par-

ties insured, and not in his own, and is affected by subsequent acts of the insured.

POLICY IS AVOIDED BY OBTAINING SUBSEQUENT INSURANCE WITH MERE ORAL CONSENT OF PRESIDENT of the insurance company, when the by-laws of the company provide that insurance subsequently obtained without the written consent of the president shall avoid the policy, and that the by-laws shall in no case be altered except by a vote of two thirds of the members of the company.

ACTION of contract on insurance policy made by the defendant to Stone and Perry upon their buildings, "in case of loss, payable to S. S. Jackson," who was a mortgagee of the insured property, and who had since, with the consent of the defendant, assigned all his interest in the policy to the plaintiff. The answer set up that subsequent insurance had been obtained without the consent in writing of the president of the company, as required by the by-laws, to the provisions of which the policy was in terms made subject. The plaintiff admitted at the trial that, after the assignment by Jackson to him, Stone and Perry had obtained other insurance on the property. The jury found, specially, that the defendants' president had orally waived the provision of the fifteenth article of its by-laws requiring the president to assent in writing to subsequent insurance, and had orally assented to the subsequent insurance. The judge reserved for the whole court whether the plaintiff was entitled to recover.

E. F. Hodges and L. Saltonstall, for the plaintiff.

G. W. Phillips, for the defendants.

By Court, **BENLOW, J.** The nature and extent of the interest which the plaintiff acquired in the policy declared on by virtue of the clause making the amount due "in case of loss payable to S. S. Jackson," and the subsequent transfer of that interest, with the assent of the defendants, by Jackson to the plaintiff, are fully stated and explained in the recent case of *Fogg v. Middlesex Mutual Fire Ins. Co.*, 10 Cush. 346. According to the principles there laid down, with the soundness of which we are entirely satisfied, the legal effect of this clause is, that the defendants agree that the plaintiff shall recover whatever the persons originally insured by the policy may be entitled to receive in case of loss; but it is only a contingent order or assignment of what may become due under the contract, and not an absolute transfer by virtue of which the plaintiff acquired the full rights of an assignee of a chose in action. The original contract with Stone and Perry still subsisted. It was their interest in the premises

which was injured. The plaintiff stands and must claim in their right as the party insured, and not in his own. It is only what they have a right to receive under the contract that is payable to him. If, therefore, by reason of any act of theirs before the loss happened, the policy was rendered void, their right to recover is destroyed, and there being no loss under the policy for which the defendants are liable, the plaintiff cannot recover. The contingency on which his claim against the defendants was to arise has not occurred.

Such being the rights of the parties under the contract, it is clear, upon the facts in this case, that the policy was annulled under the fifteenth article of the by-laws, by reason of the subsequent insurance procured by Stone and Perry on the property, without the assent of the president of the corporation in writing; unless the waiver of such written assent by the president, and his verbal consent to such subsequent insurance, as found by the jury, operate to set aside this provision in the by-laws as to this particular policy and render the contract valid, notwithstanding by its express terms, as well as by the clause in the by-laws, it would be otherwise void. But the difficulty in maintaining the plaintiff's position on this part of the case is, not only that it attempts to substitute for the written agreement of the parties a verbal contract, but that there is an entire absence of any authority on the part of the president to make such waiver, or give such verbal assent. He was an agent, with powers strictly limited and defined, and could not act so as to bind the defendants beyond the scope of his authority: *Story on Agency*, secs. 127, 133; *Salem Bank v. Gloucester Bank*, 17 Mass. 29 [9 Am. Dec. 111]. By article 15 of the by-laws, his power to assent to subsequent insurance was expressly confined to giving such assent in writing. In order to guard against the danger of over-insurance, the corporation might well require that any assent on their part to further insurance on property insured by them should be given by the deliberate and well-considered act of their president in writing, and not be left to the vagueness and uncertainty of parol proof. The whole extent and limit of the president's authority in this respect were set forth in the by-laws attached to the policy in the present case, and, as the evidence shows, were fully known to the assured: *Worcester Bank v. Hartford Fire Ins. Co.*, 11 Cush. 265 [59 Am. Dec. 145]; *Lee v. Howard Fire Ins. Co.*, 3 Gray, 584, 589.

Nor is this the only restriction on the power of the president. He had no authority to waive any by-law of this corporation.

By the revised statutes, c. 37, sec. 24, and c. 44, sec. 1, the corporation alone had power to establish by-laws "for their own government, and for the due and orderly conducting of their affairs." By article 26 it is expressly provided that the by-laws "shall in no case be altered" unless previous notice of such intended alteration be given as therein prescribed, and "it shall be voted for by two thirds of all the members present at that meeting." If the argument of the plaintiff should be carried out to its legitimate result, it would give to the president the right, in any case, to suspend or change the by-laws by his verbal act and at his pleasure. This he clearly had no power to do.

We are therefore of opinion that the finding of the jury does not render the policy valid, but that it was annulled by the subsequent insurance obtained by the assured without the written assent of the president.

Judgment for the defendants.

ORAL NOTICE OF SUBSEQUENT INSURANCE WHERE WRITTEN NOTICE IS REQUIRED BY POLICY: See *Worcester Bank v. Hartford Fire Ins. Co.*, 59 Am. Dec. 145, and note 146, 147. When policy will be avoided by taking subsequent insurance: *Clark v. N. E. Mut. Fire Ins. Co.*, 53 Id. 44, and note 53; *Conway Tool Co. v. Hudson River Ins. Co.*, 59 Id. 172.

ASSIGNMENT OF INSURANCE.—This subject is discussed in the note to *New York Life Ins. Co. v. Flack*, 56 Am. Dec. 747-755; and the status of a person to whom the policy is made payable, but not assigned, is considered at pages 750, 751, of that note; see also *Palmer v. Merrill*, 52 Id. 782.

THE PRINCIPAL CASE IS CITED to the point that oral notice of an intention to obtain subsequent insurance to the insurers is not sufficient when the policy requires actual notice and an indorsement on the policy: *Kimball v. Howard Ins. Co.*, 8 Gray, 37. Officers of a mutual insurance company cannot waive the by-laws of the company: *Mulrey v. Shasmut etc. Ins. Co.*, 4 Allen, 116; *Brewer v. Chelsea etc. Ins. Co.*, 14 Gray, 209; *Smith v. Haverhill etc. Ins. Co.*, 1 Allen, 301; such as relate to the substance of the contract: *Priest v. Citizens' etc. Ins. Co.*, 3 Id. 604; *Behler v. German etc. Ins. Co.*, 68 Ind. 354; *Westchester etc. Ins. Co. v. Earle*, 33 Mich. 150, all citing the principal case. The agent of an insurance company cannot waive notice of an assignment of the policy: *Tate v. Citizens' etc. Ins. Co.*, 13 Gray, 82. Upon the failure of the assured, the plaintiff, to testify positively that he gave the required notice to the company of subsequent insurance, it will be inferred against him that he did not give such notice: *Illinois etc. Ins. Co. v. Malloy*, 50 Ill. 421, citing the principal case. One to whom a policy is made payable is not an assignee of the policy, and is affected by the subsequent acts of the assured: *Bates v. Equitable Ins. Co.*, 10 Wall. 38. A mortgagee of real estate to whom a policy of insurance thereon is made payable in case of loss is not the assignee of the policy, and is affected by subsequent acts of the assured, and recovers in the latter's right alone: *Loring v. Manufacturers' Ins. Co.*, 8 Gray, 30; *Edes v. Hamilton etc. Ins. Co.*, 3 Allen, 364; *Franklin Savings Institution v. Central etc. Ins. Co.*, 119 Mass. 241; *Van Buren v. St. Joseph etc. Ins. Co.*, 28 Mich. 405, all citing the prin-

sipal case. In *Appleton Iron Co. v. British-America Assurance Co.*, 4 Wis. 34, it was held that, the mortgagee of chattels having the legal title thereto, the mortgagor could not transfer the property so as to defeat the policy. It was said that the legal title to a policy to the mortgagor, made payable to the mortgagee, was in the latter, and that though the rule was not the same in Massachusetts, it was not essentially different. An action may be maintained on a policy of life insurance obtained by a man on his own life without proving an insurable interest therein in the person for whose benefit it is declared on its face to be made: *Campbell v. New England etc. Ins. Co.*, 98 Mass. 389, citing the principal case.

GIBSON v. SOPER.

[8 GRAY, 279.]

CONSIDERATION NEED NOT BE RESTORED TO GRANTEE IN DEED OF INSANE PERSON before action can be maintained for recovery of the land.

VERDICT AND JUDGMENT ON PETITION FOR GUARDIANSHIP OF ALLEGED INSANE PERSON, by which such person was found to be not insane at the time of the filing of the petition, nor at the rendering of the verdict, is not conclusive evidence of the sanity of such person during the intermediate period, in an action to recover land embraced in a deed made by him during such period; though they are admissible upon the question of insanity as evidence of their having been rendered.

WRIT of entry. After trial the case was reported to the full court. The opinion states the case.

L. Sumner and R. A. Chapman, for the demandant.

J. D. Colt and O. N. Emerson, for the tenant.

By Court, THOMAS, J. This is a writ of entry, brought for the demandant by his probate guardian, to recover a farm situated in Great Barrington, in this county. The tenant pleads the general issue, and claims title under a deed of the demandant, dated July 25, 1853, but delivered some time in November of that year. The demandant replies, that at the time of the making and of the delivery of the alleged deed, he, the grantor, was an insane person.

The tenant says that at the time of the execution of the deed, and as the consideration therefor, the tenant executed and delivered to the demandant a contract in writing, by which, among other things, he stipulated to pay the debts of said Gibson, consisting in part of incumbrances upon said real estate, to support said Gibson and his wife, to pay said Gibson an annuity for his life, and to pay certain sums of money to the children of Gibson. He then offered to prove that he had made payments to-

wards said incumbrances, and upon the other debts of the demandant; that he had tendered to Henry Gibson, one of the children of the demandants, the sum stipulated to be paid him, and at the time fixed in the contract, though it had not been received by said Henry; that he had paid to the demandants the sums agreed to be paid, and had supported the demandant and his wife, as the contract provided; and that he had paid interest upon the mortgages on the estate since the action was commenced; but he did not claim that such payment was by the authority or with the consent or knowledge of the guardian.

He contended that upon proof of the payment made, and of the performance of the contract on his part, the demandant could not maintain this action, without having offered, before its commencement, to make restitution; to repay to him the amounts so paid; to compensate him for his services rendered in his behalf; to surrender to him the contract, and to indemnify him against it; and that, no offer of restitution having been made, this action could not be maintained.

The demandant then offered in writing to make such restitution and repayment, if anything was due (which he denied), in such a way and manner as the court should direct. But he contended that no offer of restitution was necessary before the commencement of the action, and that the evidence offered by the tenant was inadmissible. The tenant had been in the possession of the premises and in the receipt of the rents and profits since the deed. The presiding judge ruled, in substance, that such offer of restitution was not necessary before the commencement of the action. This ruling was, we think, clearly right. The tenant produces and relies upon his deed. The demandant says that deed is voidable in law, that is, it may be avoided unless it has been ratified or affirmed. It has not been ratified or affirmed.

The bringing of this action is an election to avoid it. Having shown that he was insane when the deed was made, and that the deed was therefore voidable, and having, by his guardian, elected to avoid it, but one question can arise, namely, Has the plaintiff, upon restoration to sound mind, or have his legal representatives, ratified or affirmed the deed—that is, given it a validity, which before and without such ratification or affirmation it did not possess, which it could acquire only by ratification?

How far the probate guardian of an insane person could ratify a deed made by his ward, or what acts of the guardian would be evidence of such ratification, it is not necessary to con-

sider; there being no evidence tending to show a ratification, either by the guardian or the ward. The only question presented in this part of the case is whether, when a deed has been executed by an insane person, it is necessary for him to make restitution of the consideration before he or his guardian or heirs can bring a suit to avoid it.

The position taken by the tenant is, that the grantor or his guardian or heirs cannot avoid the grant, unless he or they place the grantee, in all respects, in the condition in which he was before the deed. It seems to us, upon careful consideration, that such is not the rule of law; that the restitution of the consideration of the deed or purchase money is not a condition precedent to the recovery of the land.

Upon strict principles of law, this is clear. The estate is shown to have been in the demandant within the twenty years. The tenant says he holds by a deed from the demandant. But the demandant is shown to have been incapable of making a valid deed. It wants the consenting mind. The tenant must then show ratification—ratification by some act of the grantor upon his restoration to sound mind, or, possibly, by his guardian. But the grantor has remained insane ever since the deed; as incapable of confirming as of making it. The guardian has done nothing to ratify or confirm the grant. The estate is still in the demandant; for if it has passed, it has passed by the deed of an insane man, never ratified or confirmed. That, in law, was impossible. The courts have certainly gone far enough in saying such an instrument was capable of being ratified or affirmed by acts *in pais*. They have never said that, though the grantor was incapable of making a deed, it should be valid against him, however insane, unless he ascertained what was the consideration paid to him, had the means of restoration, and offered to restore; and all this as a condition precedent to the recovery of that which he never had conveyed.

No considerations of policy or equity require the adoption of such a rule. To say that an insane man, before he can avoid a voidable deed, must put the grantee *in statu quo*, would be to say, in effect, that in a large majority of cases his deed shall not be avoided at all. The more insane the grantor was when the deed was made, the less likely will he be to retain the fruits of his bargain, so as to be able to make restitution. If he was so far demented as not to know or recollect what the bargain was, the difficulty will be still greater.

One of the obvious grounds on which the deed of an insane

man or an infant is held voidable is not merely the incapacity to make a valid sale, but the incapacity prudently to manage and dispose of the proceeds of the sale. And the same incapacity which made the deed void may have wasted the price, and rendered the restoration of the consideration impossible. For example, one buys of an insane man his farm; he gives a note, good only because it has a good indorser; the insane grantor omits to have the indorser notified, and loses its value. Must he, before he can recover the estate, put the grantee in *statu quo*?

Upon the first impression it may seem equitable that such restoration should be made before the insane or infant grantor should recover his estate; but it is an impression which a little reflection removes. The law makes this very incapacity of parties their shield. In their weakness they find protection. It will not suffer those of mature age and sound mind to profit by that weakness. It binds the strong while it protects the weak. It holds the adult to the bargain which the infant may avoid; the sane to the obligation from which the insane may be loosed. It does not mean to put them on an equality; on the other hand, it intends that he who deals with infant or insane persons shall do it at his peril. Nor is there, practically, any hardship in this; for men of sound minds seldom unwittingly enter into contracts with infants or insane persons.

If the law required restitution of the price as a condition precedent to the recovery of the estate, that would be done indirectly which the law does not permit to be done directly; and the great purpose of the law, in avoiding such contracts, the protection of those who cannot protect themselves, defeated. The insane grantor could not avoid the deed of his estate, because the same folly which induced the sale had wasted the proceeds, the result against which it is the policy of the law to guard.

Whether the grantee, whose deed is avoided on this ground, may recover back the price, and under what circumstances and to what extent, presents a quite different question, into which it is not necessary to enter. The only question before us is whether its restoration is a condition precedent to the recovery of the estate in a writ of entry, upon proof that the grantor was insane when the deed was made, and in the absence of all evidence of ratification?

Doubtless, if the grantor, having been restored to sound mind, or the infant upon coming of age, still retains and uses

the consideration of the deed without offer to restore; or seeks to enforce the securities, or avail himself of the contract which constituted such consideration; such conduct may furnish satisfactory, and it may be conclusive, evidence of a ratification. And this is the extent, we think, to which the cases have gone, upon which the tenant especially relies: *Allis v. Billings*, 6 Met. 415 [39 Am. Dec. 744], and *Arnold v. Richmond Iron Works*, 1 Gray, 434.

The first of these cases settled that a deed of land by an insane person is voidable only, and not void, and may therefore be ratified by him when he is of sound mind. The instruction to the jury was, that such a deed was absolutely void; this the court overruled, holding that the deed might be ratified by the party when he was of sane mind. "Upon the point first relied upon," say the court, "namely, that the demandant was insane when he executed the deed, the jury should have been instructed that this fact, if established, rendered the deed voidable, and that it was competent for the defendant to avoid it on that ground, if not estopped by his subsequent acts done while in his right mind; but that a voidable deed was capable of confirmation, and that if the grantor in his lucid intervals, or after a general restoration to sanity, then being of sound mind, and well knowing and understanding the nature of the contract, ratified it, adopted it as a valid contract, and participated in the benefits of it by receiving from the purchaser the purchase money due on the contract, this would give effect to the deed, and render the same valid in the hands of the grantee, and would thus become effectual to pass the lands and divest the title of the grantor:" *Allis v. Billings*, 6 Met. 421 [39 Am. Dec. 744].

This extract states the law as settled in this commonwealth: that the deed is voidable; that it becomes a binding contract upon the grantor only when, being of sound mind and understanding the nature of the contract, he adopts and ratifies it; and that the availing himself of the contract, by receiving the purchase money due upon it, after his restoration to sanity, and with an understanding of the contract, is a ratification and adoption.

The case of *Arnold v. Richmond Iron Works*, 1 Gray, 437, goes no further. The report of the referees found that the plaintiff was restored to his right mind, and after his restoration, knowing the nature and effect of the conveyance, and that the notes were part of the purchase money for the premises conveyed, received several payments upon them. By so doing,

it was held he affirmed the deed. The decision is put directly upon the authority of *Allis v. Billings*, *supra*, as "so like in all its essential features, that it seems hardly necessary to do more than cite that case."

The tenant relies upon some remarks of the chief justice in delivering the opinion of the court, as sustaining his position. Nothing is more unsafe than to rely upon such remarks, taken from the connection and context by which their meaning is limited and qualified. In their relation and application to the facts under discussion, they may be sound and pertinent; wrested from their connection and application, and applied to a different state of facts, they may be neither just nor sound.

In the case of *Arnold v. Richmond Iron Works*, *supra*, the plaintiff had been restored to a sound mind. Being so restored, and understanding fully the contract he had made, he chose to avail himself of its benefits. The chief justice remarks: "If, then, the unfortunate person of unsound mind, coming to the full possession of his mental faculties, desires to relieve himself from a conveyance made during his incapacity, he must restore the price if paid, or surrender the contract for it if unpaid. In short, he must place the grantee, in all respects, as far as possible *in statu quo*." As applied to the case of a grantor having in his possession the notes which were the consideration of the deed, and restored to the full possession of his mind, these remarks are just. The retention of the notes, still more the receiving payments upon them, is evidence of ratification, is an election to abide by the contract.

But they have no just application to a case where the grantor has not been restored to sanity, and where no act has been done to affirm the deed, and the grantor has never been in a condition capable of affirming it. Nor do they, considered in their relation to the facts of the case, affirm the doctrine that, even upon restoration to sanity, restitution of the price is a condition precedent to the avoidance of the deed and recovery of the estate. If the grantor still has the notes, contract, or deed of land, and elects to retain them, it may be he affirms his grant. This is the extent to which the doctrine can be carried. If the remarks are susceptible of the broader construction contended for by the tenant, they do not, upon consideration, command our assent.

One other question remains upon the report. On the fifth of March, 1853, a petition was filed in the court of probate for the appointment of a guardian over the demandant. The judge of probate declined. An appeal was entered in this court, and the

cause continued to May term, 1854, when an issue upon the sanity of the demandant was made to the jury. The jury found by their verdict that the demandant was not insane when the petition was filed, nor when the verdict was rendered. Upon this verdict judgment was rendered for the respondent. The tenant claimed that such verdict and judgment were conclusive evidence of the mental condition of Gibson at the time of making the contract, or at the time of making the petition and the time of rendering the verdict; or were, at least, presumptive evidence.

Of course they were not conclusive, as a man may be sane in April, 1853, and in May, 1854, and yet insane in July and November, 1853. To say that the judgment is presumptive evidence, even if applied to the time of the contract, is to give it no special force; for the presumption of sanity is made by the law itself.

The tenant further claimed that it was not proof of sanity at the time of making the deed; it was of sanity at a time subsequent, and so might be important upon a question of ratification.

The presiding judge ruled "that the said proceedings and record were not conclusive evidence of the sanity of the party at the time therein stated; that they were admissible and competent to show the fact that the party was not put under guardianship at that time, and was not found by the courts in which the trials were had, upon the evidence then offered, to be an insane person; that as to presumption of sanity, that was to be presumed till the contrary was shown; that as to the case before them, the jury must judge upon all the evidence, as a part of which they might take the fact that in the proceedings in the court of probate he was found by the jury to be sane."

These instructions, we think, were certainly sufficiently favorable to the tenant. He has no right to complain. Speaking for myself, it is difficult to see how, in the trial of this cause, any effect could be given to the decision of the judge of probate, or the verdict of the jury in the supreme court of probate; for this jury could not properly know upon what evidence, or absence of evidence, such decision or verdict was based; and if not, what weight or degree of force they could give to the fact.

It is said by the tenant that if the jury had found the grantor was insane, their verdict would be conclusive. But this is not so unless it had been followed by the appointment of a guardian. And then the party becomes incapable of contracting, not merely from the state of his mind, but because the power of

present control over his property is taken from him; which is also the case with a spendthrift under guardianship, who may yet be of wholly sound mind. But a person under guardianship for insanity may make a will, if it can be shown that he was of sound mind when the will was made.

Judgment on the verdict. —

WHETHER NECESSARY FOR INFANT TO RESTORE CONSIDERATION BEFORE RESCINDING CONTRACT: See *Manning v. Johnson*, 62 Am. Dec. 732, and note on this subject 734-738. The principal case is cited to the point that an infant need not return consideration before suing to avoid his deed: *Chandler v. Simmons*, 97 Mass. 514; *Brown v. Hartford etc. Ins. Co.*, 117 Id. 479, 480; *Carpenter v. Carpenter*, 45 Ind. 146. And to the same effect, with respect to an insane person, it is cited: *Foss v. Hildreth*, 10 Allen, 80; *Burnham v. Mitchell*, 34 Wis. 138. The rule of the principal case concerning the returning of the consideration is said to be good law where there is fraud practiced upon the person *non compos*, but not so where the purchase is made in good faith, for a good consideration, and without knowledge of the insanity: *Eaton v. Eaton*, 37 N. J. L. 117, 118; so in *Fay v. Burditt*, 81 Ind. 441; *Fulwider v. Ingels*, 87 Id. 418. It was said, citing the principal case, that the exception to the rule, that a party seeking to rescind a contract must restore the other party to *status quo*, rests upon the deficient capacity of the party who seeks to be relieved from the contract: *Bartlett v. Drake*, 100 Mass. 176. That the grantee in a deed of an insane person is not entitled to a restoration of the purchase money is held in *Rogers v. Walker*, 47 Am. Dec. 470.

DEED OF INSANE PERSON IS VOIDABLE, NOT VOID: *Allie v. Williams*, 39 Am. Dec. 744, and note 749; *Wall v. Hill's Heirs*, 36 Id. 578; *Bensell v. Chancellor*, 34 Id. 561. Though it is held to be void in *Rogers v. Walker*, 47 Id. 470. The principal case is cited to the point that a contract of an insane person who has not been adjudged insane is voidable, and not void, and if ratified may become valid: *Carrier v. Sears*, 4 Allen, 337; *Howe v. Howe*, 99 Mass. 98; *White v. Graves*, 107 Id. 328; *Blakeley v. Blakeley*, 33 N. J. Eq. 506; *Nichols v. Thomas*, 53 Ind. 53; *Mohr v. Tulip*, 40 Wis. 82. The deed of insane person, to be a valid conveyance, must be ratified by the grantor when of sound mind, or by his guardian, his heirs, or devisees: *Valpey v. Rea*, 130 Mass. 384, citing the principal case.

INQUIRY OF LUNACY, EFFECT OF AS EVIDENCE: See *In re Gangwer's Estate*, 53 Am. Dec. 554, and note 561, citing prior cases.

HAYDEN v. BRADLEY.

[6 GRAY, 425.]

LESSOR HAS ACTION ON LESSOR'S COVENANT TO REPAIR without giving him notice of want of repair, especially where the lease contains a covenant that the lessor may enter to view and make improvements.

ACTION of contract for damages because of the defendant's failure to keep in repair buildings leased to the plaintiff by the

defendant. The lessor covenanted in the lease to keep the buildings in good condition during the term; and the lessees covenanted that the lessor might enter to view and make improvements. The defendant contended that he was not liable until notice given him of want of repair. The court instructed that it was the defendant's duty to take notice of want of repair. Verdict for the plaintiff, and exceptions by the defendant.

H. Voss, for the defendant.

W. G. Bates, for the plaintiff.

By Court, METCALF, J. The established rule of law which the court are now to apply is rightly stated by Lord Abinger in *Vyes v. Wakefield*, 6 Mee. & W. 452, 453. It is this: "Where a party stipulates to do a certain thing in a certain specific event, which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him." The case at bar comes within the first branch of this rule. The defendant stipulated to maintain the buildings in good condition during the term for which he demised them to the plaintiff, on the happening of a specific event, to wit, that they should not be in good condition, but should need repairs. He might have known, or made himself acquainted with the fact, that they needed repairs. And he did not stipulate for notice: See *Smith v. Goffe*, 2 Ld. Raym. 1126; *Smith v. —*, 11 Mod. 48; 1 Saund. Pl. & Ev., 2d ed., 214; System of Pleading, 126, 127; Lawes's Pleadings in Assumpsit, Am. ed., 176 et seq.

But if the defendant's agreement to maintain the buildings in good condition were not of itself sufficient to decide the question raised in this case, yet there is another clause in the lease which is decisive, namely, the reservation by the defendant of a right of entry upon the premises, "to view and make improvements." He therefore, having provided for himself the means of ascertaining the contingency upon which he was to make repairs, was not entitled to notice from the plaintiff that the contingency had happened: *Keys v. Powell*, 2 A. K. Marsh. 254.

Exceptions overruled.

COVENANT TO REPAIR WILL BE CONSTRUED AS BINDING COVENANTOR to rebuild, in the event of the destruction of the structure without fault of the covenantee: *Beach v. Crain*, 49 Am. Dec. 369, and note 374.

VERRY v. McCLELLAN.

[5 GRAY, 535.]

LICENSEE TO SELL WHOLE REAL ESTATE OF DECEDENT, and published notice to show cause why license should not be granted to sell whole real estate, do not concur with and are not based upon a petition to sell a specific portion of the estate, and the license is therefore void; and it will not support an action by the administrator to recover the specific portion of the realty, under a statute that gives an administrator who has been licensed to sell certain lands an action to recover them as having been fraudulently conveyed by the decedent.

WRIT of entry. The opinion states the case.

P. O. Bacon and G. F. Verry, for the demandant.

G. F. Hoar, for the tenant.

By Court, THOMAS, J. This is a writ of entry, brought by the demandant, as administrator of the remaining estate of John Titus, to recover possession of certain lands in Douglas and Sutton, in this county. The estate of the deceased had been represented insolvent. The demandant seeks to recover the estate on the ground that it had been conveyed by the deceased with intent to defraud his creditors, and was therefore chargeable with his debts, and liable to be sold for their payment: R. S., c. 71, sec. 11. The twelfth section of the same chapter authorizes an executor or administrator, who has been licensed to sell any lands so fraudulently conveyed by the deceased, to obtain possession thereof by entry or action, and to sell them within one year after obtaining possession. To maintain the action, then, the administrator must show that he has been duly licensed to sell.

The land demanded in the writ consists of three parcels, situated in Douglas and Sutton. The inventory of the estate of the deceased contained three parcels. The estate which the administrator petitioned the probate court for license to sell was represented to "consist of a lot of land situated in said Sutton, with an undivided half of a dwelling-house standing thereon, appraised at eight hundred dollars." The petition represented that "by a sale of part of said real estate the residue would be greatly injured;" and the prayer was for license to sell "the whole of the said real estate of said deceased" for the payment of debts and charges of administration. The notice issued was to show cause why license should not be granted to the administrator "to sell the whole of the real estate of said deceased." The license granted was "to sell the whole of the real estate of

said deceased." The prayer was for license to sell a specific estate.

It is very plain that the notice and license do not concur with and are not based upon the petition, and that the license is therefore irregular and void. If so, this action cannot be maintained.

Demandant nonsuit.

JURISDICTION TO ORDER SALE OF REALTY DEPENDS UPON PETITION AND ACCOUNT: *Bloom v. Burdick*, 37 Am. Dec. 299, and note 309. If sufficient in form, they confer jurisdiction: *Atkins v. Kinnan*, 32 Id. 534.

ORDER TO SELL "ALL REAL ESTATE" OF DECEDENT will authorize a sale, but it is more regular to describe the lands to be sold: *Doe v. Henderson*, 48 Am. Dec. 216. In such an order, a description of land as ninety-one acres of a certain lot is not defective if the decedent owned that number of acres and no more: *Bloom v. Burdick*, 37 Id. 299. In *Tenney v. Poor*, 14 Gray, 500, the court held that the probate court might license an executor to sell real estate sufficient to pay a larger sum than that represented in the petition as the amount of the debts and charges of administration, distinguishing the principal case.

RICHARDSON v. COPELAND.

[6 GRAY, 536.]

BOILER SET IN BRICK-WORK, AND NOT REMOVABLE WITHOUT TAKING DOWN BRICK-WORK, and steam-engine annexed by being bolted to granite block, both affixed by the owner of the freehold, become part of the realty, and a mortgage upon them as personalty, made to the manufacturer of them after sale and annexation, passes no title in them as against a subsequent purchaser of the real estate, even with notice of the mortgage.

USAGE OF TRADE BETWEEN MANUFACTURERS AND PURCHASERS OF ENGINES AND BOILERS to treat such property as personalty, is not competent to make such property personalty when annexed to the freehold.

ACTION of tort for the conversion of a steam-engine and boiler, which were manufactured by Putnam for the owner of the freehold, and were set up for him in a building erected for the purpose, and which were used for running machinery in his adjoining shop. The boiler was set into brick-work, and could not be removed without taking down the brick-work; and the engine was set upon a granite block and affixed thereto by a bolt or pin. After the engine and boiler were set up and in operation, Putnam gave a bill of sale of them to the purchaser, and at the same time received back from him a mortgage thereof, which was recorded as a mortgage of personal property. Afterwards, upon breach of the condition of the mortgage, Putnam gave the

owner due notice of his intention to foreclose the mortgage. The purchaser of the engine and boiler afterwards became insolvent, and the premises upon which they were erected were sold by his assignees to one Harlow, who knew of the mortgage to Putnam and of the proceedings had thereon. Harlow afterwards sold the engine and boiler to the defendant Copeland, who removed them. The plaintiff afterwards purchased the rights of Putnam, gave notice thereof to the defendant, and demanded the property of him. The plaintiff offered to prove a general usage or custom of trade between manufacturers and purchasers of such property, by which it was looked upon and treated as personalty in all respects. The evidence was held incompetent. Upon these facts, the case was submitted to this court upon the agreement that if the action could be maintained, or if the evidence offered was competent, the case should stand for trial; otherwise judgment should be for the defendant.

N. Wood, for the plaintiff.

J. W. Fletcher and C. Devens, jun., for the defendant.

By Court, *SHAW, C. J.* This is an action of tort, in the nature of trover, to recover the value of a steam-engine and boiler. To maintain this action, the plaintiff must prove property in himself, and a conversion by the defendant.

Upon the facts stated, the court are of opinion that the engine and boiler, having been erected on the premises of Josiah Richardson, of which he was then the owner in fee, subject to several mortgages, became annexed to the freehold: *Winslow v. Merchants' Ins. Co.*, 4 Met. 306. This real estate comprised a manufactory occupied and carried on by said Richardson, and the engine was erected to furnish power for such manufactory. The steam-boiler was permanently set in brick-work, and could not be removed without taking down the brick-work, and the engine was permanently annexed to the buildings. This permanent annexation of the engine and boiler to the freehold *de facto* rendered them part of the realty, and his agreement with the builders to give them a mortgage thereon as personal property, as against all those who took title to the estate in fee, was inoperative and void. No title to these articles passed as personal property to the mortgagees which they could assert against a third party. The engine and boiler thus remained part of the realty till Josiah Richardson became insolvent and the estate passed to his assignees, subject to the right of the mortgagees

of the real estate; it was rightly sold by order of the commissioner, on their petition, and a good title passed to Harlow, the purchaser. He afterwards severed them, and thus reconverted them into personal property, as he lawfully might, and sold them to the defendant, who thereby took a good title.

The evidence of usage was rightly rejected; it could not be received to control the operation of law arising from the actual annexation of the engine and boiler to the freehold. If it be said it might have tended to show the intent of the parties, the answer is, that the intent of the parties was manifest enough from the agreement of the parties and the mortgage. But the difficulty was (by mistake of the law, no doubt), that this intention was one which the law could not carry into effect—that of hypothecating a portion of the realty as personal property without severance. The fact that Harlow had full knowledge of the history of the mortgage did not impair his right to be a purchaser.

It is to be observed, as a fact important to the present case, that the engine and boiler were purchased and set up in the factory by one who himself owned the freehold. Had they been so bought and placed by a tenant on leased premises, the case might have presented a different question.

Judgment for the defendant.

FIXTURES DEFINED: See *Bishop v. Bishop*, 62 Am. Dec. 68, and note 68, collecting prior cases in this series.

BETWEEN MORTGAGOR AND MORTGAGEE, VENDOR AND VENDEE, DESTOR AND EXECUTION CREDITOR, the same rule obtains with respect to fixtures as between heir and executor: *Harkness v. Sears*, 62 Am. Dec. 742; *Degraffenreid v. Scruggs*, 40 Id. 658; *Despatch Line v. Bellamy Co.*, 37 Id. 203; *Voorhis v. Freeman*, Id. 490; *Buller v. Page*, 39 Id. 757; *Winslow v. Merchants' Ins. Co.*, 38 Id. 368, and cases cited in the notes thereto; though as between landlord and tenant the rule is more favorable to the tenant, with respect to fixtures annexed during the term for purposes of trade and ornament: *Wall v. Hinds*, 64 Id. 64; *Stockwell v. Marks*, 35 Id. 286; *Estate of Hinds*, 34 Id. 542, and notes.

ENGINES AND BOILERS FIRMLY FIXED TO FREEHOLD, and used to furnish motive power to machinery, are a part of the realty, between persons bearing to one another any of the former class of the above relations: *Winslow v. Merchants' Ins. Co.*, 38 Am. Dec. 368; *Harkins v. Sears*, 62 Id. 742; *Despatch Line v. Bellamy Co.*, 37 Id. 203; but see *Randolph v. Gwynne*, 51 Id. 268. But a steam-engine erected by a tenant for life might be removed: *Estate of Hinds*, 34 Id. 542. The principal case is cited to the point that a steam-engine and boiler, machinery, etc., were fixtures as between a mortgagor and mortgagee: *Lynde v. Rowe*, 12 Allen, 101; that an engine and a boiler set in masonry and affixed by bolts are fixtures for which trover will not lie: *Raddin v. Arnold*, 116 Mass. 272. When fixed to the freehold by screws and

bolts, and specially adapted to be used in connection therewith, certain machinery was held to be fixtures, as between vendor and purchaser of the realty: *McLaughlin v. Nash*, 14 Allen, 138. So rails laid upon the track of railroad company become a part of the realty, in the absence of any agreement to the contrary: *Hunt v. Bay State Iron Co.*, 97 Mass. 283. Though a steam-engine, boiler, belting, and shafting may be of the character of trade fixtures as between landlord and tenant, as between mortgagors and mortgagees of the land they become part of the realty: *Ex parte Ames*, 7 Bank. Reg. 235, 237; S. C., 1 Low. 566, 568.

ACTS OF OWNER SUBSEQUENT TO ANNEXATION, such as giving a chattel mortgage without severance, will not, as against a purchaser of the land, disconnect it from the realty and give it the character of personalty: *Madigan v. McCarthy*, 106 Mass. 377, citing the principal case to this effect. A house built upon and annexed to land cannot be shown to be personalty, as against a subsequent grantee of the land, by evidence of an oral agreement of the owner of the land after the building had been begun. "The intention of the parties, if it existed, to change this to personal property was one which the law could not carry into effect:" *Gibbs v. Estey*, 15 Gray, 580, citing the principal case.

USAGE CANNOT BE RECEIVED TO CONTROL OPERATION OF LAW: *Dickinson v. Gay*, 7 Allen, 34, citing the principal case to this effect. Upon this point, see *Atwood v. Reliance Trans. Co.*, 34 Am. Dec. 503; *Beirne v. Dord*, 55 Id. 321, and note 329, citing prior cases.

FITCHBURG & WORCESTER R. R. Co. v. HANNA.

[5 GRAY, 589.]

DAMAGES TO GOODS ON ANY PART OF LINE OF TRANSPORTATION, which is composed of the line of several carriers, who, by their common agent, agree to transport the goods over the whole line at a specified freightage, which is to be divided among the several carriers in stipulated proportions, may be set off in an action by one carrier for the whole freightage.

COMMON CARRIER'S RESPONSIBILITY, AS SUCH, COMMENCES AS SOON AS GOODS ARE DELIVERED TO and accepted by him for the purpose of transportation, though not immediately laden upon the vessel, car, or carriage, in the absence of stipulations restricting his liability in this respect.

ACTION of contract for freightage on goods. The opinion states the case.

F. H. Dewey, for the defendants.

N. Wood, for the plaintiffs.

By Court, *MERRICK, J.* The plaintiffs' road extends only from Sterling junction to Fitchburg; but their road, together with the railroads of certain other corporations and the steamboats of the Commercial Steamboat Company, constitutes one continuous line of transportation between the latter place and the city of New York. By the mutual agreement of all these

companies, the freight earned on the whole route is to be divided between them in certain stipulated proportions. In April, 1854, Odell, who was the agent of the steamboat company, contracted with the defendants to transport for them sixty-eight bales of rags from New York to Fitchburg, at the rate of five dollars and fifty cents per ton; and in pursuance of this agreement the rags were delivered to the steamboat company on their pier in the city of New York, and were subsequently carried over the line and delivered to the defendants at Fitchburg.

If this service had been performed, and no special agreement had been made in relation to the terms upon which it should be done, each of the several parties who contributed towards it would have been entitled to a reasonable compensation, in proportion to the service which they respectively rendered, and would have been liable only for such failures and delinquencies as occurred on their own portions of the line. But the plaintiffs now claim to recover for the freight of the rags over the entire route, at the rate stipulated for in the contract made by Odell. They thus recognize that contract as one made on their account, and assert their right to insist upon and avail themselves of its provisions. This claim is assented to by the defendants, who have made no objection, as they undoubtedly might have done, to the maintenance of this action, that other parties equally interested with the plaintiffs are not joined with them in its prosecution. Under these circumstances, Odell must be considered as having acted, in making the contract, as the agent of all the parties by and for whom the freight was earned. And as they thus became jointly entitled to recover compensation for the service performed, they in like manner were made responsible for the damages consequent upon the failure, in whatever part of the line it occurred, to transport the goods in safety.

It is in this essential particular, of a special contract entered into by the parties, that this case is clearly distinguishable from that of *Nulling v. Connecticut River Railroad Co.*, 1 Gray, 502, where the obligation imposed upon the defendants in reference to goods to be carried to New York, concerning which they made no express stipulations, was held to be only the safe transportation of them over their own road, and delivery of them to the proper carriers to be forwarded towards their ultimate destination. But the obligation which, in the absence of any express stipulation, would be implied by law, may always be varied and

enlarged, as was done in the present case, by an express agreement; and then the rights and duties of the parties to it are to be enjoyed and enforced in conformity with what is required by its provisions.

But the plaintiffs contend that if they are thus, under the contract made by Odell as the agent of all the parties engaged in the business of transporting merchandise upon and over the one common continuous line, responsible for the safe carriage and delivery of the goods received for that purpose from the defendants, the defense relied on cannot be maintained, because no injury was done to the bales of rags after their liability as common carriers first attached. And in conformity to their wishes, the jury were advised by the judge who presided at the trial that it did not commence while the bales were lying on the pier or in the warehouse of the steamboat company, nor until they were actually shipped on board the vessel. This instruction, we think, cannot be sustained. The general and well-settled rule, in relation to the responsibility of a common carrier, is, that it commences whenever and as soon as goods have been delivered to and accepted by him solely for the purpose of their transportation. And this is to be so, although they are not immediately put *in itinere*, but are first, for his own convenience, and as only preparatory to the voyage or journey, temporarily deposited on his wharf or in his store. In such case, the deposit is a mere accessory to the carriage, and does not postpone the commencement of his liability as a common carrier to the time when they shall be actually put in motion towards the place of their destination; Story on Bailments, secs. 534, 536. And such should have been the instructions given to the jury; under which they would have determined, if there could have been any doubt upon the evidence submitted to them, both in what relation the bales of rags, when delivered to the steamboat company, as shown by the receipt of their agent Tourtellot, were accepted by them, and the precise period of time when their liability as common carriers commenced.

In the case of *Norway Plains Co. v. Boston & Maine Railroad*, 1 Gray, 263 [61 Am. Dec. 143], it was upon much consideration, and for reasons very fully set forth by the court, held that the liability of railroad corporations as common carriers terminates when the goods transported are unladen from the cars, and placed on the platform in their depot in a suitable and convenient position to be received and taken away by the owner or consignee. And it was strenuously urged upon us, in the argu-

ment for the plaintiffs, that a similar rule should prevail in reference to the commencement of their liability; and that they are to be considered only as warehousemen while the goods remain on the wharf, or in a depot or warehouse, and until they are in fact laden in the vessel, car, or carriage in which they are to be conveyed. But the reasons which induce, and indeed render necessary, the adoption of that rule in the former case are inapplicable to the latter. When goods are brought and delivered to a party for transportation, he can determine for himself in what relation he will receive them. If he is a common carrier, he is certainly required by law to take and transport goods tendered to him for that purpose. But he is to have a reasonable opportunity to make the necessary preliminary preparation for that service; and he can, therefore, if he chooses so to protect himself, whenever it is necessary and proper that he should have some intermediate time for preparation before proceeding on the voyage or journey, receive the goods, and keep them during such intervening period as a warehouseman, and not as a common carrier. It is obvious from these considerations that the well-established rule respecting the commencement of his liability in the latter relation is as well adapted to the recent as to preceding modes of conveyance; and is as safe for the carrier as it is certain and convenient to owners and consignees. And therefore, no exigency having arisen to require it, there is no reason why any modification of the rule should be adopted.

Exceptions sustained.

WHERE COMMON CARRIERS FORM CONTINUOUS LINE, contracting to carry whole distance for through freightage payable at the terminus, and are shown by other evidence to have intended to contract collectively, one of the companies is liable for injuries occurring elsewhere than on its own road: *Bradford v. South Carolina R. R. Co.*, 62 Am. Dec. 411; *Hart v. Besselaer & S. R. R. Co.*, 59 Id. 447, and note 450, collecting prior cases. Merely receiving goods marked to a place beyond its terminus will not render the carrier so liable: See *Elmore v. Naugatuck R. R. Co.*, 63 Id. 143. The principal case is cited to the point that railroad companies may contract to carry freight and passengers beyond the limits of their own roads, and thus become liable for acts and neglects of other carriers in no sense under their control: *Wheeler v. San Francisco etc. R. R. Co.*, 31 Cal. 53, 54. So a railroad corporation may assume responsibility for the safe transportation of baggage beyond the limits of its own road: *Najac v. Boston & Lowell R. R. Co.*, 7 Allen, 333. But in *Darling v. Boston & Worcester R. R. Corp.*, 11 Id. 297, it was held that where each of the several connecting lines pays to its predecessor on the route the amount due for carriage up to that time, and delivers the goods to the next succeeding carrier, the last one collecting the whole freightage from the consignee and paying the whole of the preceding charges, no such agency exists as makes the last company liable for an injury done the goods before it received them;

and the principal case is distinguished on the ground that therein an agency existed such as to render the last company so liable. So in *Gass v. New York etc. R. R. Co.*, 99 Mass. 227, it was held that no partnership or joint liability for loss of goods was created by several carriers forming a continuous line, agreeing to transport over the whole route at a certain rate of freight collected by the last carrier, and divided in an agreed proportion between the several carriers; and the principal case was distinguished, since in that case the company, charged with damage occurring on another line, were suing upon the contract for the entire transportation, and claimed an interest in the entire freight. Similarly it is cited to the point that in the absence of any special agreement the carriers forming a continuous line would be responsible only within the limits of their own road: *Strong v. Grand Trunk R. R. Co.*, 15 Mich. 218.

COMMON CARRIER'S POWER TO LIMIT LIABILITY BY CONTRACT: See *Dorr v. New Jersey Steam Nav. Co.*, 62 Am. Dec. 125, and note 129; *Graham v. Davis*, Id. 285, and note 294; *Kimball v. Rutland etc. R. R. Co.*, Id. 567. The rights of the carrier must be determined by his contract with the customer, and if he neglects to guard against an unforeseen contingency, he must suffer; as where he undertakes to procure the renewal of notes or to return them, he cannot excuse his non-performance by the fact that after delivering them to an indorser for examination the indorser was summoned in trustee process, and refused to give them up or renew them: *Wareham Bank v. Burt*, 5 Allen, 117, citing the principal case. Delivery to carrier necessary to make him liable for the goods: *Merriam v. Hartford etc. R. R. Co.*, 52 Am. Dec. 344, and note 349; note to *Governor v. Withers*, 50 Id. 99.

WHERE CARRIER RECEIVES GOODS INTO HIS WAREHOUSE for the accommodation of himself and his customers, so that the deposit there is a mere accessory to the carriage and for the purpose of facilitating it, his liability as carrier will commence with the receipt of the goods. The principal case is cited to this effect in *Judson v. Western R. R. Corp.*, 4 Allen, 522. It is also cited to the point that a carrier may contract to receive goods in the character of a warehouseman, and thus avoid the liability of a carrier until he is ready to load the goods upon his vessel or vehicle: *Jones v. New England etc. Steamship Co.*, 71 Me. 60.

PERRY v. CITY OF WORCESTER.

[6 GRAY, 544.]

ACTION OF TORT WILL NOT LIE FOR DAMAGES RESULTING from the reasonably proper and skillful exercise of the right of eminent domain.

ACTION OF TORT WILL LIE AGAINST CITY FOR DAMAGES RESULTING FROM IMPROPER AND UNSKILLFUL MANNER in which a public work is executed in the exercise of the right of eminent domain.

CITY IS LIABLE IN TORT FOR DAMAGES resulting from building in place of an old bridge a new one, with water-ways so narrowed and reduced that in times of freshet the water of the stream is set back upon the plaintiffs' mills, when a suitable bridge might have been built without narrowing the water-ways.

ONE IS NOT ESTOPPED FROM RECOVERING IN TORT AGAINST CITY for damages accruing from the unskillful construction of a public work, because he was a member of the committee of the city council who made the report in favor of the construction and the contract for the work.

ACTION of tort for the obstruction of the water-wheel of the plaintiffs' mill, caused by the water of the stream being thrown back upon it because of the manner in which the defendant had built a bridge across the stream. The case was submitted to the court of common pleas, and to this court upon appeal, upon a case stated. In 1829 a highway had been laid out by the county commissioners across the river, and damages had been awarded to the former owner of the plaintiffs' premises. The highway was constructed, and a wooden bridge built across the river, but no material injury was caused to the plaintiffs' mill, which is situated a little way higher up on the bank of the river, though in very high water the water-wheel was slightly obstructed. In 1849 this bridge, having become decayed, was unsafe, and was removed by direction of the city council of Worcester, and a new bridge of stone was built. The abutments of this bridge were carried farther toward the center of the river than were those of the old bridge, and thus the space for the passage of the water of the stream was lessened by some feet. The bridge could have been built without so diminishing the width of the space through which the stream flowed; yet the plaintiffs did not contend that the act was wanton on the part of the authorities of Worcester, nor that the bridge was not built in the honest exercise of their discretion. The effect, however, of this contraction of the water-way was, in times of floods or freshets, to obstruct the usual flow of water and passage of ice, and to set back the water and ice upon the plaintiffs' mill, and thus to prevent the use of the mill during such times, and to cause other damage. The stone bridge was built according to a plan adopted by the city council, and in the manner directed by them, under the supervision of a committee appointed by them. J. G. Perry, one of the plaintiffs, was a member of the city council and of this committee, and with the other members of the committee signed a report to the city government, and signed an agreement with the contractor for the building of the bridge. If the plaintiffs' action can be maintained, they are to have judgment for seventy-five dollars with costs; if not, they are to become nonsuit.

O. Allen and P. C. Bacon, for the plaintiffs.

O. Devens, jun., for the defendants.

By Court, SHAW, C. J. The question raised and discussed in this case was whether the damages sustained by the plaintiffs, in the occasional flooding of their mills, by the bridge erected

over the Blackstone river, should be claimed as damages, and awarded as such by the city or by county commissioners, or whether an action at law will lie to recover them.

We think the distinction is well established by authorities, and founded upon just principles, that where damage is necessarily done to the property of an individual by taking his land for a highway, town way, or bridge, or by changing the grade of a way, extinguishing an easement, injuring an adjacent building, draining a well, or otherwise, where such work is authorized by public authority for public use, and all damage necessarily incident to such work, such works are legally regarded as warranted by the public, in the exercise of the right of eminent domain, they are legal and right; they are not unlawful; and therefore no action will lie, as for a tort, but damage must be sought by the owner of the property in the manner pointed out by law: *Dodge v. County Commissioners*, 3 Met. 380; *Ashby v. Eastern Railroad Co.*, 5 Id. 368; *Babcock v. Western Railroad Corporation*, 9 Id. 553 [43 Am. Dec. 411]; *Parker v. Boston & Maine Railroad*, 3 Cush. 107 [50 Am. Dec. 700].

But this presupposes that the public work thus authorized will be executed in a reasonably proper and skillful manner, with a just regard to the rights of private owners of estate. If done otherwise, the damage is not necessarily incident to the accomplishment of the public object, but to the improper and unskillful manner of doing it. Such damage to private property is not warranted by the authority under color of which it is done, and is not justifiable by it. It is unlawful, and a wrong for the redress of which an action of tort will lie; whether against the immediate agent or his employers is not now a question. In recurring to the facts agreed in the present case, it seems to us very clear that the case falls within the latter branch of the above distinction; the damage suffered by the plaintiffs was not necessarily occasioned by the building of a suitable bridge, but by building a bridge with water-ways so narrowed and reduced that in times of freshet it would not discharge the water of the stream freely, and so set it back occasionally upon the plaintiffs' mills. We think the fact that Josiah G. Perry, one of the plaintiffs, was a member of the city council and of the committee who made the report and the contract for building the bridge, cannot be relied on as a waiver of his right. He was acting in a public capacity. Probably neither he nor the other members actually knew or supposed that the bridge they recommended would cause damage to the mills, and the proba-

bility is that it was not known till after the bridge was erected; the default was in adopting a plan for a bridge not contrived with sufficient skill and with a proper regard to the volume of water, the strength and rapidity of the current at all seasons, and the capacity of the water-ways to discharge it. For such default, we think it cannot be held that the members of the committee were personally estopped from asserting their private rights.

Judgment for the plaintiffs.

THOMAS, J., did not sit in this case.

TESTS FOR DETERMINING CITY'S LIABILITY FOR DAMAGES OCCASIONED BY EXECUTION OF GOVERNMENTAL OR SOVEREIGN POWERS.—In the beginning, it is well to note the distinction existing between cities which are true municipal corporations and unincorporated towns, counties, school districts, and the like, with restricted powers, which are *quasi* corporations. The latter are involuntary corporations, created by the state for the better government of the people. The former are created at the solicitation or with the consent of people, composed more for their own local advantage, are vested with more numerous powers, and subjected, accordingly, to more numerous liabilities: Dillon on Mun. Corp., secs. 22-24. This distinction is also pointed out in the opening of the note to *Browning v. City of Springfield*, 63 Am. Dec. 350-355. It is with the former class that we shall have to do—with municipal corporations proper, with incorporated cities and towns.

Again, the double character of the municipal corporation is to be noted. Courts have agreed in viewing a city in two aspects: the first governmental, legislative, or public; and the second private. This distinction is continually involved in ascertaining the common-law liability of municipal corporations, and the rule generally stated is, that while exercising powers of the former class, the city, like the state or sovereign government, which it in this respect more completely represents, can incur no common-law liability, while in exercising powers and privileges of the latter, or private, class, such as entering upon contracts, or engaging in undertakings for its private, and, as it were, personal, benefit, it may, and often does, incur many implied common-law liabilities: See Dillon on Mun. Corp., sec. 66; *Lloyd v. Mayor of N. Y.*, 55 Am. Dec. 347; *Bailey v. Mayor of N. Y.*, 38 Id. 669; *Stewart v. City of New Orleans*, 9 La. Ann. 461; S. C., 61 Am. Dec. 218. Another view of a city's powers and duties is presented where it fails or neglects to exercise powers of these two classes. Thus, for a failure to carry out discretionary powers of a public or legislative character, a city is not liable in damages: *Wilson v. Mayor of N. Y.*, 1 Denio, 595; S. C., 43 Am. Dec. 719; as where it has discretion as to the time and manner of constructing corporate improvements, such as making and grading streets, building bridges, making drains, sewers, and the like. In such cases, "neither *mandamus* nor a private action will lie against the corporation for omitting or neglecting to act; and the reason is, that such powers are conferred to be exercised or not, as the public interest is deemed to require, and there is no implied liability for deciding either that the public interest does not require action or that it requires action in a particular way. There may be, however, as elsewhere shown, an implied liability for the negligent or unskillful manner in which strictly corporate powers,

as distinguished from public powers, are carried into execution, although there was no perfect duty resting on the corporation to enter upon works or undertakings involving the exercise of such powers:" Dillon on Mun. Corp., sec. 949. See also *infra*. For the neglect of a judicial or discretionary duty, no civil action lies; while for the neglect of a ministerial duty, such an action will lie: *Wilson v. Mayor of N. Y.*, 1 Denio, 595; S. C., 43 Am. Dec. 719, and note 723. The subject of the liability of cities for neglect to repair streets is discussed in the note to *Browning v. City of Springfield*, 63 Id. 350-355. In this note we shall direct and confine our attention to the ascertaining and illustration of principles upon which a city may become liable in damages in the performance of such acts as involve at the outset the exercise of governmental or sovereign powers.

WHILE ACT OF MUNICIPAL CORPORATION REMAINS JUDICIAL, QUASI JUDICIAL, DISCRETIONARY, OR LEGISLATIVE, it will not be liable; but when, in carrying into execution this legislative act, it acts in a ministerial capacity, and in this capacity acts through its agents negligently, unskillfully, and in a manner productive of unnecessary injury, it will be liable in damages therefor.

Sewers.—Thus in providing for sewerage or drainage, under the power vested in it by the legislature, the municipality acts in the former capacity in deciding the time when, the manner in which, and the place where this work shall be instituted. Therefore, for the results of its decisions in this respect it would not be liable; nor would it be liable in a civil action for a failure to provide sewerage or drainage; nor for a defective or ineffective plan of drainage or sewerage adopted: *Mills v. Brooklyn*, 32 N. Y. 489; *Wilson v. Mayor of N. Y.*, 1 Denio, 595; S. C., 43 Am. Dec. 719; *Child v. Boston*, 4 Allen, 41, 52; *Carr v. Northern Liberties*, 35 Pa. St. 324; *City Council v. Gilmer*, 33 Ala. 116; S. C., 26 Id. 665; *Atchison v. Chalias*, 9 Kan. 603, overruling *Leavenworth v. Casey*, McCahon, 124; *McCarthy v. Syracuse*, 46 N. Y. 194; *Winn v. Rutland*, 52 Vt. 481; *Merrifield v. Worcester*, 110 Mass. 216; S. C., 14 Am. Rep. 592; *Daniels v. Denver*, 2 Col. 669; *Wicks v. De Witt*, 54 Iowa, 130; see also *Thurston v. St. Joseph*, 50 Mo. 519; but see *Detroit v. Beckman*, 34 Mich. 125; S. C., 22 Am. Rep. 507. Though there is, however, respectable authority to the effect that whatever the plan of sewerage adopted, if the sewers or drainage system backs up and throws upon private property water which would not otherwise have flowed there, the city will be liable: *Ashley v. Port Huron*, 35 Mich. 296; S. C., 24 Am. Rep. 552, per Cooley, C. J.; see also *Rowe v. Portsmouth*, 56 N. H. 291; S. C., 22 Am. Rep. 464; *Pumpelly v. Green Bay Co.*, 13 Wall. 168, 181; *Nevins v. Peoria*, 41 Ill. 502; *Pettigrew v. Evansville*, 25 Wis. 223; *Evansville v. Decker*, 84 Ind. 325; S. C., 43 Am. Rep. 86; *Bannagan v. District of Columbia*, 2 Mackey, 285. Of this authority Judge Dillon says: "This exception to the general doctrine, when properly limited and applied, seems founded on sound principle, and will have a salutary effect in inducing care on the part of the municipality to avoid such injuries to private property, and will operate justly in giving redress to the sufferer if such injuries are inflicted:" Dillon on Mun. Corp., sec. 1047. Still the weight of authority is with the view that in adopting a plan of drainage the city acts judicially, and is not liable. So if the drains prove of insufficient size to remove all the water, though the property is partly drained, the corporation will not be liable: *Mills v. Brooklyn*, 32 N. Y. 489; *Barry v. Lowell*, 8 Allen, 127; *Flagg v. Worcester*, 13 Gray, 601; *Atchison v. Chalias*, 9 Kan. 603; *Dermont v. Detroit*, 4 Mich. 435; *Judge v. Meriden*, 38 Conn. 90; *McCarthy v. Syracuse*, 46 N. Y. 194; *Van Pelt v.*

Davenport, 42 Iowa, 306; *Collins v. Philadelphia*, 93 Pa. St. 272; see *Carr v. Northern Liberties*, 35 Id. 324; *Grant v. Erie*, 69 Id. 420; S. C., 8 Am. Rep. 272; *Denver v. Capell*, 4 Col. 25; *Ranlett v. Lowell*, 126 Mass. 431.

Streets.—Likewise, courts will not inquire whether the grade adopted by the city in grading its streets is the best one, or whether one causing less damage, but equally serviceable, could not have been used: *Roberts v. Chicago*, 26 Ill. 249; *Snyder v. Rockport*, 6 Ind. 237; *Regnolds v. Shreveport*, 13 La. Ann. 426. For the city here acts discretionarily or judicially, this power having been intrusted to it by the legislature. So, of the plan for the construction of a new street, though it would be liable for the negligent execution of the plan: *Foster v. St. Louis*, 71 Mo. 157.

Motive with Which City Acts in carrying out a power legally vested in it by the legislature is not to be inquired into, and its liability cannot be made to depend upon this: *Benjamin v. Wheeler*, 8 Gray, 409; *Mayor etc. v. Randolph*, 4 Watts & S. 514; *Chalfield v. Wilson*, 28 Vt. 49; *City Council v. Gilmer*, 23 Ala. 116.

When, however, the City Ceases to Act Judicially or Legislatively, and begins to act ministerially, it will become liable in damages for the negligent discharge of, or negligent omission to discharge, such acts. In selecting and adopting a plan upon which a public work is to be constructed, the city may be said to act judicially; but when it begins to carry out this plan, it acts ministerially, and is bound to see that the work is done in a reasonably safe and skillful manner: *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; S. C., 53 Am. Dec. 316; *Barton v. Syracuse*, 36 N. Y. 54; *Lacour v. New York*, 3 Duer, 406; *Lloyd v. New York*, 5 N. Y. 369; S. C., 55 Am. Dec. 349, and note; *Hardy v. Brooklyn*, 90 N. Y. 435; S. C., 43 Am. Rep. 182; *Jones v. New Haven*, 34 Conn. 1; *Parker v. Lowell*, 11 Gray, 353; *Wilson v. New York*, 1 Denio, 595; S. C., 43 Am. Dec. 719; *Logansport v. Wright*, 25 Ind. 512; *Martin v. Brooklyn*, 1 Hill (N. Y.), 545; *Mellen v. Western R. R. Co.*, 4 Gray, 301; *Mills v. Brooklyn*, 32 N. Y. 489; *Wheeler v. Worcester*, 10 Allen, 591; *Eastman v. Meredith*, 36 N. H. 284; *Meares v. Commissioners*, 9 Ired. L. 73; S. C., 49 Am. Dec. 412; *Munn v. Pittsburgh*, 40 Pa. St. 364; *Memphis v. Lasser*, 9 Humph. 757. Thus, if in carrying out a plan for the construction of sewers, drains, culverts, and the like, the work is so negligently and unskillfully performed as to flood the property of private persons, or cause other private injuries, the city will be liable; the basis of its liability being the negligence in carrying out the plan: *Wallace v. City of Muscatine*, 4 G. Greene, 373; S. C., 61 Am. Dec. 131; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; S. C., 53 Am. Dec. 316, note 320, 321; *Barton v. Syracuse*, 36 N. Y. 54; S. C., 37 Barb. 392; *Nims v. Troy*, 59 N. Y. 500; *Kobe v. Minneapolis*, 22 Minn. 159, 164; *McClure v. Red Wing*, 28 Minn. 186; *South Bend v. Paxon*, 65 Ind. 228; *Savannah v. Spears*, 66 Ga. 304; *Burton v. Chattanooga*, 7 Lea, 739; *Emery v. Lowell*, 164 Mass. 13; *McGregor v. Boyle*, 34 Iowa, 268; *Detroit v. Corey*, 9 Mich. 165; *Fink v. St. Louis*, 71 Mo. 52; *Mills v. Brooklyn*, 32 N. Y. 489; *Commissioners v. Wood*, 10 Pa. St. 93, 95; *Smith v. New York*, 66 N. Y. 295; S. C., 23 Am. Rep. 53; see *Child v. Boston*, 4 Allen, 41; *Winn v. Rutland*, 52 Vt. 481; *Dillon on Mun. Corp.*, sec. 1051. A riparian proprietor cannot recover for the pollution of a stream by sewers, so far as it is attributable to the plan of sewerage adopted by the city, but he can recover so far as it is attributable to improper construction or unreasonable use of sewers, or to negligence or other fault of the city in the management of sewers: *Merrifield v. City of Worcester*, 110 Mass. 221. Unless the city be specially authorized by statute, if it makes and empties a

common sewer upon the property of another to his injury, it will be liable to him in an action of tort: *Proprietors of Locks v. Lowell*, 7 Gray, 223; *Erdeth v. Lowell*, 11 Id. 345; *Haskell v. New Bedford*, 108 Mass. 298; *Wels v. Madison*, 75 Ind. 241; S. C., 39 Am. Rep. 735; *Arn v. Kansas*, 14 Fed. Rep. 226; *Field v. West Orange*, 36 N. J. Eq. 118; *Evansville v. Decker*, 84 Ind. 325; S. C., 43 Am. Rep. 86. So where streets or sewers are undergoing repair, and the streets are rendered unsafe by the direct act of the city, it is the duty of the city to keep railings around excavations or other dangerous places, or to have them otherwise guarded, that passers may not fall into them and be injured, and for negligence in failing to do this the city will be liable: *Jacobe v. Bangor*, 16 Me. 187; S. C., 33 Am. Dec. 652; *Kimball v. City of Bath*, 38 Me. 219; S. C., 61 Am. Dec. 243; *Lloyd v. New York*, 5 N. Y. 369; S. C., 55 Am. Dec. 347; *City of Buffalo v. Holloway*, 7 N. Y. 493; S. C., 57 Am. Dec. 550; see *Blake v. Ferris*, 5 N. Y. 48; S. C., 55 Am. Dec. 304; *Burnham v. Boston*, 10 Allen, 290; *Detroit v. Corey*, 9 Mich. 165; *West v. Brockport*, 16 N. Y. 161; *Chicago v. Major*, 18 Ill. 349; *Chicago v. Starr*, 42 Ill. 174; *Cincinnati v. Stone*, 5 Ohio St. 38; *Conrad v. Ithaca*, 16 N. Y. 158; *Wendell v. Troy*, 30 Barb. 329; *Mayor v. Sheffield*, 4 Wall. 189; *Grant v. Brooklyn*, 41 Barb. 381; *Baltimore v. Pennington*, 15 Md. 12; *Pfau v. Reynolds*, 53 Ill. 212; *Brooks v. Somerville*, 106 Mass. 271; *Covington v. Bryant*, 7 Bush, 248; *Chicago v. Hesing*, 83 Ill. 204; S. C., 25 Am. Rep. 378. But see *Detroit v. Beckman*, 34 Mich. 125; S. C., 22 Am. Rep. 507. Where the excavation is made by a contractor with the city, the authorities are at variance whether the city is liable or only the contractor, though the better authority is said to be that the city is liable: *Dillon on Mun. Corp.*, sec. 1027; *Pearson v. Zable*, 78 Ky. 170; *Welsh v. St. Louis*, 73 Mo. 71; *Broadwell v. Kansas*, 75 Id. 213; S. C., 42 Am. Rep. 406; *Vanderslice v. Philadelphia*, 103 Pa. St. 102; *Dressell v. Kingston*, 32 Hun, 533.

WHERE AN ACT IS DONE BY CITY UNDER AUTHORITY OF VALID STATUTE OF charter, it is not liable for consequential damages to persons or property necessarily incidental to the work performed, unless the action is given by the statute, even when the same act, if done without legislative authority, would have been actionable. But the act must be performed with reasonable care, and without want of reasonable skill: *Callender v. Marsh*, 1 Pick. 418; *Radcliff v. Mayor etc. of Brooklyn*, 4 N. Y. 195; S. C., 53 Am. Dec. 357, note 366-368; *Bellinger v. N. Y. etc. R. R. Co.*, 23 N. Y. 42; *Pontiac v. Carter*, 32 Mich. 164; *Detroit v. Beckman*, 34 Id. 125; S. C., 22 Am. Rep. 507; *Cumberland v. Willison*, 50 Md. 138; *Rounds v. Mumford*, 2 R. I. 154; *Sprague v. Worcester*, 13 Gray, 193; *Bennett v. New Orleans*, 14 La. Ann. 120; *Snyder v. Rockport*, 6 Ind. 237; *Flagg v. Worcester*, 13 Gray, 601, 605; *Governors v. Meredith*, 4 T. R. 794; *Whitehouse v. Fellowes*, 7 C. B., N. S., 779; *Mersey Dock Cases*, 11 H. L. Cas. 713, 714; *Alexander v. Milwaukee*, 16 Wis. 247; *Commissioners of Kensington v. Wood*, 10 Pa. St. 93; S. C., 49 Am. Dec. 582; *Mearns v. Commissioners*, 9 Ired. L. 73; S. C., 49 Am. Dec. 412; *Merrifield v. Worcester*, 110 Mass. 221; *Wheeler v. Worcester*, 10 Allen, 603.

An illustration of the application of this rule is furnished when a city exercises its power conferred by the legislature, of laying out, repairing, grading, and improving streets and highways. If the city, in performing this work, exercises reasonable care and skill, and does no unnecessary injury, it will not be liable for the natural and necessary consequences of its undertaking; that is, for consequential damages to private premises the city will not be liable, in the absence of a statutory liability. Such is the case, for example, where by the raising or lowering of the grade adjoining property becomes inconvenient

of access or injured in other respects necessarily in the process of grading: *Callender v. Marsh*, 1 Pick. 418; *Wilson v. Mayor of New York*, 1 Denio, 595; S. C., 43 Am. Dec. 719; *Radcliff v. Mayor of Brooklyn*, 4 N. Y. 195; S. C., 53 Am. Dec. 357; *People v. Green*, 64 N. Y. 606; *Reading v. Keppleman*, 61 Pa. St. 233; *Mayor of Philadelphia v. Randolph*, 4 Watts & S. 514; S. C., 39 Am. Dec. 102; *Green v. Reading*, 9 Watts, 382; S. C., 36 Am. Dec. 127; *Smith v. Washburn*, 20 How. 135, 149; *Snyder v. Rockport*, 6 Ind. 237; *Terre Haute v. Turner*, 36 Id. 522; *Trenton etc. Co. v. Raff*, 36 N. J. L. 335; *Nebraska City v. Lamplin*, 6 Neb. 27; *Wakefield v. Pawtucket*, 12 R. I. 75; *Reynolds v. Shreveport*, 13 La. Ann. 426; *Gosler v. Georgetown*, 6 Wheat. 593; *McShell v. Rome*, 49 Ga. 29; *Quincy v. Jones*, 76 Ill. 231; S. C., 20 Am. Rep. 243; *Humes v. Mayor of Knoxville*, 1 Humph. 403; S. C., 34 Am. Dec. 657; *Kimball v. City of Bath*, 38 Me. 219; S. C., 61 Am. Dec. 243; *Hovey v. Mayo*, 43 Me. 322; *Schattner v. Kansas City*, 53 Mo. 162; *Imler v. Springfield*, 55 Id. 119; *Wegmann v. Jefferson*, 61 Id. 55, 56; *Stockford v. St. Louis*, 7 Mo. App. 217; *Skinner v. Bridge Co.*, 29 Conn. 523; *Burritt v. New Haven*, 42 Id. 174; *Simmons v. Camden*, 26 Ark. 276; S. C., 7 Am. Rep. 20; *Burlington v. Gilbert*, 31 Iowa, 356; S. C., 7 Am. Rep. 105; *Hendershott v. Ottumwa*, 46 Iowa, 658; *White v. Yazoo City*, 27 Miss. 327; *Alden v. Minneapolis*, 24 Minn. 254; *Shaw v. Crocker*, 42 Cal. 435; *Transportation Co. v. Chicago*, 99 U. S. 635; *Newport etc. Bridge Co. v. Foote*, 9 Bush, 264; *Bailey v. Philadelphia etc. R. R. Co.*, 4 Harr. (Del.) 389; S. C., 44 Am. Dec. 593; *Keasy v. City of Louisville*, 4 Dana, 154; S. C., 29 Am. Dec. 395. In Ohio the courts go further, and make the city liable for consequential damages in certain cases: *Town Council v. McComb*, 18 Ohio, 229; S. C., 51 Am. Dec. 453; *Cincinnati v. Penny*, 21 Ohio St. 499; *Youngstown v. More*, 30 Id. 133; *Akron v. Chamberlain Co.*, 34 Id. 328; *Stewart v. Clinton*, 79 Mo. 603; see also *Eaton v. Railroad Co.*, 51 N. H. 504, 529; *Pumpelly v. Green Bay Co.*, 13 Wall. 166.

So when the city, acting within the limits of its power, grades the whole width of the street so as to cause the fences or improvements of the adjacent proprietor to fall, it is not liable, nor is it bound to build a wall or erect supports to protect such property: *Taylor v. St. Louis*, 14 Mo. 20; S. C., 55 Am. Dec. 89; *St. Louis v. Gurno*, 12 Mo. 414; *Pontiac v. Carter*, 32 Mich. 164; *Rome v. Omberg*, 28 Ga. 46; *Quincy v. Jones*, 76 Ill. 231; S. C., 20 Am. Rep. 243; *Transportation Co. v. Chicago*, 99 U. S. 635; but see *Meares v. Commissioners*, 9 Ired. L. 73; S. C., 49 Am. Dec. 412.

For the depreciation of the rental value of property caused by the bad smells of a sewer in course of construction, unless it is kept open an unreasonable length of time, the city is not liable: *Arn v. Kansas*, 14 Fed. Rep. 236. A city may protect itself from the overflow of water by constructing a levee, and is not liable to an owner of a lot situated between the levee and the river: *Hoard v. Des Moines*, 62 Iowa, 326.

Liable for Negligent Execution of Statutory Power.—But where, in prosecuting the work of grading, laying out, or repairing streets, the city, through its agents, causes unnecessary damage by reason of the improper, unskillful, and negligent manner in which the work is performed, the city will be liable in damages: *Shawneetown v. Mason*, 82 Ill. 337; *Bloomington v. Brokaw*, 77 Id. 194; *Wegmann v. Jefferson*, 61 Mo. 55, 53; *Thompson v. Booneville*, Id. 282; *Hunt v. Booneville*, 65 Id. 620; *Hendershott v. Ottumwa*, 46 Iowa, 658 (depositing earth in adjoining lot); *Shaw v. Crocker*, 42 Cal. 435; *Commissioners v. Wood*, 10 Pa. St. 93; S. C., 49 Am. Dec. 582; *Meares v. Commissioners*, 9 Ired. L. 73; S. C., 49 Am. Dec. 412; *Sprague v. Tripp*, 13 R. I. 38; S. C., 43 Am. Rep. 11; *Keating v. Cincinnati*, 38 Ohio St. 141; S. C., 43

Am. Rep. 421; *Martinsville v. Shirley*, 84 Ind. 546; *North Vernon v. Voegler*, 80 Id. 77. As where excavations are left unguarded: *Supra*; *Kimball v. City of Bath*, 38 Me. 219; S. C., 61 Am. Dec. 243. For placing an embankment, necessary to support the street, upon the land of an adjoining owner, the city is liable in tort: *Mayo v. Springfield*, 136 Mass. 10. For negligence in laying water-pipes under statutory authority, the city will be liable: *Perkins v. Lawrence*, Id. 305.

And, in general, though there is no implied liability for damages necessarily occasioned by an improvement authorized by law, still, if this public work is carried out in an improper, negligent, and unskillful manner, the city will be subject to a common-law liability for the damages resulting therefrom. For the damages necessarily incident to the work, the city sustains no implied liability. It is no more liable than the state would be if it were executing the same work. It is for the damages incident to and growing out of the wrong of the city or its officers in negligently performing a lawful duty that the city is liable. And this latter ground is the basis of its liability in this respect: *Brine v. Railway Co.*, 110 Eng. Com. L. 402, 411; *Sprague v. Worcester*, 13 Gray, 153; *Proprietors of Locks v. Lowell*, 7 Gray, 223; *Flagg v. Worcester*, 13 Id. 601, 605; *McGregor v. Boyle*, 34 Iowa, 268; *Emery v. Lowell*, 104 Mass. 13; *City Council v. Gilmer*, 33 Ala. 116; *Barton v. Syracuse*, 36 N. Y. 54; *Conrad v. Ithaca*, 11 Id. 158; *Carr v. Northern Liberties*, 35 Pa. St. 324; *Atchison v. Challiss*, 9 Kan. 603; *Judge v. Meriden*, 38 Conn. 90; *Van Pelt v. Davenport*, 42 Iowa, 306; *Jacksonville v. Lambert*, 62 Ill. 519; *Mersey Dock Cases*, 11 H. L. Cas. 713; *Cowley v. Mayor of Sunderland*, 6 H. & N. 565. See also the principal case.

DEGREE OF CARE NECESSARY.—The degree of care and foresight necessary in the erection of public improvements must be in proportion to the nature and magnitude of the injury likely to result from the occurrence to be anticipated and guarded against, and should be that care and prudence which a discreet and cautious man would or ought to use if the risk and loss were to be exclusively his own: *City of Madison v. Ross*, 3 Ind. 236; S. C., 54 Am. Dec. 481. A reasonable degree of care should be exhibited by the city: *Supra*; *Dillon on Mun. Corp.*, sec. 987; *Fuller v. Atlanta*, 66 Ga. 80; *Brown v. Atlanta*, Id. 71; *Allen v. Chippewa Falls*, 52 Wis. 430; S. C., 38 Am. Rep. 748; *McClure v. Red Wing*, 28 Minn. 186.

RUNNING STREAMS AND SURFACE WATER.—It is necessary to note a distinction between the liability of cities respecting the overflowing private property with running streams or with surface water. Though the rules for determining the liability of the corporation are applied similarly in each case, yet the results are quite different. The distinction depends to a great extent upon the general rules of law appertaining to running streams, and which do not obtain respecting surface water, i. e., the water collecting upon the streets and highways of a city from rain, hail, snow, and ice, and perhaps, in some cases, springs or seepage. In the case of running streams, the rights of riparian proprietors are involved; such rights as to have the stream flow past their land in its accustomed manner without diminution or pollution, and the right not to have his lands overflowed by means of dams or other obstructions maintained by a lower proprietor. Such rights as these a city may infringe; whereas, in the case of surface water the land-owner has not the same rights that may be infringed. Surface water "the law very largely regards (as Lord Tenterden phrases it) as a common enemy, which every proprietor may fight or get rid of as best he may:" *Dillon on Mun. Corp.*, sec. 1039.

To the effect that the law regards surface water and natural streams in

materially different lights, and that a city has much greater powers and less liabilities with respect to surface water than in regard to natural streams, see 3 Kent's Com. 439, 440; 2 Washb. on Real Property, 64; *Ross v. St. Charles*, 49 Mo. 509; *Inler v. Springfield*, 55 Id. 119, 127; *Flagg v. Worcester*, 13 Gray, 601; *Goodale v. Tuttle*, 29 N. Y. 459; *Gould v. Booth*, 66 Id. 62; *Kellogg v. Thompson*, Id. 88; *Vanderweile v. Taylor*, 65 N. Y. 341; *Little Rock v. Willis*, 27 Ark. 572; *Macomber v. Godfrey*, 108 Mass. 219; S. C., 11 Am. Rep. 349; *Briscoe v. Drought*, 11 I. R. C. L. 250; *Wood v. Ward*, 3 Exch. 748; *Hoyt v. Hudson*, 27 Wis. 656; S. C., 9 Am. Rep. 473; *Van Pelt v. Desmoyne*, 42 Iowa, 308; S. C., 20 Am. Rep. 622.

Obstruction of Natural Stream.—If the city were specially authorized by statute to obstruct a running stream, such as flows in a channel between well-defined banks, the legal rights of the parties would of course be changed, and the city in obstructing the stream would do so representing the state, and would partake of the latter's immunity from suit: See *supra*, where a city's liability, when acting under an express statute, is discussed. But if, without any special authorization such as this, but acting merely under its general powers over streets and highways, and its powers to construct beneficial improvements, it unnecessarily obstructs the free flow of such a stream, and causes it to flow or set back upon the land of others, it will be liable for the damages so caused. Here, as elsewhere, applies the principle that for the necessary, inevitable, incidental, and consequential damages arising out of the exercise of its chartered powers it will not be liable: See *supra*, as before. And its liability in tort will rest as always in the matters treated herein upon its negligence in the execution of its chartered powers. The material distinction to be borne in mind is that the general powers of eminent domain over streets, highways, and the like are not to be construed, where a natural stream is involved, as permitting the unnecessary obstruction thereof, and that such unnecessary obstruction—that is, such obstruction as might have been avoided by constructing in a different manner the structure which causes the obstruction, or by the exercise of greater diligence in maintaining the water-ways in a free and open condition—is negligence on the part of the city in carrying out its charter powers and performing its charter duties, and makes it liable for the damage caused. Such obstructions are usually caused by defective, badly constructed, and insufficient water-ways and culverts in bridges and roads; and where these cause injury to private property, and injury that might have been avoided, the city is liable in tort for the damages. This is the rule of the principal case. See also *Haynes v. Burlington*, 38 Vt. 350; *Mayor of Helena v. Thompson*, 29 Ark. 569; *Groton v. Haines*, 36 N. H. 388; *Gilman v. Laconia*, 55 Id. 130; S. C., 20 Am. Rep. 175; *Aurora v. Love*, 93 Ill. 521; *Wheeler v. Worcester*, 10 Allen, 591; *Stack v. East St. Louis*, 85 Ill. 377; *Mootry v. Danbury*, 45 Conn. 550; *Anthony v. Adams*, 1 Met. 234, 235; *Parker v. Lowell*, 11 Gray, 353; *Sprague v. Worcester*, 13 Id. 193 (same bridge as principal case); *Lawrence v. Fairhaven*, 5 Id. 110; *Talbot v. Whipple*, 7 Id. 122; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; S. C., 53 Am. Dec. 316; *Mills v. Brooklyn*, 32 N. Y. 489; *Gould v. Booth*, 66 Id. 62; *Smith v. Mayor etc. of N. Y.*, Id. 295; *Kobe v. Minneapolis*, 22 Minn. 159, 164; *Powers v. Council Bluffs*, 50 Iowa, 197; *Ross v. Madison*, 1 Ind. 231; *Madison v. Ross*, 3 Id. 236; S. C., 54 Am. Dec. 481; *Dayton v. Pease*, 4 Ohio St. 80; *Mayor v. Randolph*, 4 Watts & S. 514; S. C., 39 Am. Dec. 102; see also *Stetson v. Faxon*, 19 Pick. 147, 158; *Thayer v. Boston*, Id. 510; *Phinney v. Augusta*, 47 Ga. 260; *Indianapolis v. Lawyer*, 38 Ind. 348. It is to be noted that where, as in the construction of sewers and drains, the plan adopted cas-

not render the corporation liable, in the present case a defective plan, as in the principal case, may, if carried out, furnish a basis for liability. For the unnecessary diversion of a stream from its natural course, thereby causing damage to private proprietors by overflow, the city will be liable: *Barns v. Hannibal*, 71 Mo. 449; *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Kellogg v. Thompson*, 66 N. Y. 88; *Manning v. Lowell*, 130 Mass. 21; *Vogel v. New York*, 92 N. Y. 10; S. C., 44 Am. Rep. 349. So for obstruction of navigation: *Garitte v. Baltimore*, 53 Md. 422. The damage, however, must be real, substantial, and appreciable, and not merely theoretical or slight, or such as may be caused by an unusual or extraordinary swell of waters: *Sprague v. Worcester*, 13 Gray, 193. For damage ensuing from extraordinary freshets, such as may not be reasonably expected annually to occur, and especially where the bridge has proved serviceable for several years, the city will not be liable: *Id.*; *Madison v. Ross*, 3 Ind. 236; S. C., 54 Am. Dec. 481; *Mayor v. Bailey*, 2 Denio, 433; see also *Smith v. Mayor*, 66 N. Y. 295; *Cumberland v. Willson*, 50 Ind. 138. A city was not liable for the backing up of a stream by a bridge which, when constructed, was sufficient to allow the free flow of water as the stream then was, or with such changes as were liable to be produced by natural causes alone, though it eventually proved insufficient for this purpose through changes produced by the exercise by a railroad corporation of its chartered rights, or by the wrongful acts of individuals: *Wheeler v. City of Worcester*, 10 Allen, 591. A city is not liable for the obstruction of a stream caused by the increase of the surface wash from streets into the same, if the result of the natural growth of the city: so, of emptying of sewers: *Id.*

In the Case of Surface Water, the liability of the city is much less stringent: See *supra*, "Sewers." There is no liability for non-exercise of the power of drainage so as to prevent the flowing of surface water upon property adjacent to streets: See *Id.*; *Lynch v. Mayor*, 76 N. Y. 60; *Mills v. Brooklyn*, 32 N. Y. 489; *Grant v. Erie*, 69 Pa. St. 420; *Allentown v. Kramer*, 73 Pa. St. 406; *Fair v. Philadelphia*, 88 Id. 309; *Bennett v. New Orleans*, 14 La. Ann. 120; *Aurora v. Pulfer*, 56 Ill. 270; *Schattner v. Kansas City*, 53 Mo. 162; *Flagg v. Worcester*, 13 Gray, 601; *Wheeler v. Worcester*, 10 Allen, 591; *Roll v. Augusta*, 34 Ga. 326; *City Council v. Gilmer*, 33 Ala. 116; *Atchison v. Challiss*, 9 Kan. 603. Nor is the city liable for not preventing the flow of surface water upon the lots of adjacent proprietors when the work of grading a street is begun, for this is the natural and necessary consequence of the exercise of the right of eminent domain, vested in the city with respect to grading its streets. The owner must protect himself by a fence or bulwark: *Flagg v. Worcester*, 13 Gray, 601; *Imler v. Springfield*, 55 Mo. 119; *Baxter v. Providence*, 12 R. I. 310; S. C., 17 Am. Rep. 645; cases cited *supra*; see *Aurora v. Reed*, 57 Ill. 29; *Gould v. Booth*, 66 N. Y. 62, 65; *Weis v. Madison*, 75 Ind. 241; S. C., 39 Am. Rep. 135; *Evansville v. Decker*, 84 Ind. 325; S. C., 43 Am. Rep. 86; *Mogarity v. Wilmington*, 5 Del. 530; *Stewart v. Clinton*, 79 Mo. 603; *Springfield v. Spence*, 39 Ohio St. 665. A city, in grading its streets and constructing gutters for surface water, is not bound to provide against extraordinary storms, not usually provided against by persons of ordinary prudence: *Allen v. Chippewa Falls*, 52 Wis. 430; S. C., 38 Am. Rep. 748; *Evansville v. Decker*, 84 Ind. 325; S. C., 43 Am. Rep. 86.

There are also many cases which hold that in executing its lawful authority over grading and improving streets, the city is not liable for purposely turning surface water upon the land of adjacent proprietors. But though the authorities are numerous, they are open to doubt: *Dillon on Mun. Corp.*, sec. 1041, 1042. But in general, it may be stated that for the natural and neces-

ary results of grading or improving highways, by which surface water is turned upon adjacent proprietors, a city is not liable: *Wilson v. Mayor of N. Y.*, 1 Denio, 595; S. C., 43 Am. Dec. 719, and note 723; *Mayor of Philadelphia v. Randolph*, 4 Watts & S. 514; S. C., 39 Am. Dec. 102; *Dillon on Mun. Corp.*, sec. 1043-1045; *Stewart v. Clinton*, 79 Mo. 603.

Where through negligence of the city adjacent property is flooded with surface water, as where this occurs through the negligent and faulty construction of sewers, drains, or culverts, or through failure to repair them or to remove obstructions therein, the city may be liable: *Supra*, "Sewers;" *Dillon on Mun. Corp.*, sec. 1048-1051; but see *Stewart v. Clinton*, 79 Mo. 603. And if, in grading or repairing streets or sewers, the surface water is unnecessarily and negligently cast upon the property of the adjacent proprietor, or this is purposely or intentionally done, the better authority undoubtedly is that the city will be liable. This view is adopted by Judge Dillon: *Dillon on Mun. Corp.*, secs. 1041, 1042; and many of the later cases follow this as the true rule: *Noonan v. Albany*, 79 N. Y. 470; S. C., 35 Am. Rep. 540; *Smith v. Alexander*, 33 Gratt. 208; S. C., 36 Am. Rep. 788; *Gillison v. Charleston*, 16 W. Va. 282; S. C., 37 Am. Rep. 763; *Barnes v. Hannibal*, 71 Mo. 449; *Weis v. Madison*, 75 Ind. 241; S. C., 39 Am. Rep. 135; *West Orange v. Field*, 37 N. J. Eq. 600; S. C., 45 Am. Rep. 670; *North Vernon v. Voegler*, 89 Ind. 77; *Princeton v. Gieske*, 93 Id. 102; but see *Noble v. St. Albans*, 56 Vt. 522.

LIABILITY OF CITIES FOR NEGLIGENCE TO REPAIR STREETS: Note to *Browning v. City of Springfield*, 63 Am. Dec. 350-355.

LIABILITY OF MUNICIPAL CORPORATION FOR NEGLIGENCE OF OFFICERS AND AGENTS in construction and repair of public works: See notes to *Wallace v. City of Muscatine*, 61 Am. Dec. 133; *Lorillard v. Town of Monroe*, 62 Id. 124; *Deane v. Randolph*, 132 Mass. 477.

MUNICIPAL CORPORATION IS NOT LIABLE FOR NECESSARY DESTRUCTION OF BUILDINGS to prevent the spread of flames: *Surrocco v. Geary*, 58 Am. Dec. 385; see *Hale v. Lawrence*, 47 Id. 190, and note discussing the subject 207-210; *American Print Works v. Lawrence*, 57 Id. 420, note 433. But it is liable for the unnecessary destruction: *Bishop v. Mayor of Macon*, 50 Id. 400.

THE PRINCIPAL CASE IS CITED to the point that a city is not liable for the natural and necessary consequences of the exercise of the right of eminent domain: *Flagg v. City of Worcester*, 13 Gray, 603, 605, 607. If a public work is built so as to cause unnecessary damage by reason of want of reasonable care and skill in its construction, then the right of eminent domain will not protect those by whom the work is done from an action of tort: *Wheeler v. City of Worcester*, 10 Allen, 603; *Merrifield v. Worcester*, 110 Mass. 221. A city is liable in damages for the negligent obstruction of the natural flow of a stream by means of a bridge or culvert: *Parker v. City of Lowell*, 11 Gray, 358; *Sprague v. City of Worcester*, 13 Id. 195; *Hill v. Boston*, 122 Mass. 358; *Bryant v. Bigelow Carpet Co.*, 131 Id. 499. A city is responsible for the negligent and unskillful conduct of servants in the execution of a public work: *Deane v. Randolph*, 132 Id. 477. The erection by a railroad corporation of a bridge, under their franchise, in a proper and suitable manner, but which, nevertheless, caused the flowing back of water upon the premises, would be a lawful incumbrance, for which an action for breach of covenant against incumbrances would lie in favor of the owner of the premises; but if the bridge were unnecessarily built in such a manner as to produce this result, or the obstruction of the stream were wanton, this would be an unlawful act, for which an action of tort would lie, but it would constitute no breach of the covenant: *Lathrop v. Grosvenor*, 10 Gray, 54. All the above cases cite the principal case.

ESTABROOK v. SMITH.

[6 GRAY, 570.]

INDORSEMENT OF NOTE PAYABLE TO FIRM, OR ORDER, BY ONE PARTNER in his individual name, does not authorize the other partner to sue thereon in his own name.

ACTION of contract on a promissory note, payable to "Estabrook & Richmond, or order," and indorsed by Richmond in his own name, in order to transfer his interest in the note to his partner Estabrook, who is the plaintiff. It is submitted to this court whether this indorsement enabled the plaintiff to maintain an action on the note in his own name.

D. Foster, for the plaintiff.

E. Washburn, for the defendant.

By Court, DEWEY, J. We take the rule to be uncontroverted, that a promissory note payable "to A B, or order," cannot be transferred so as to give a right of action in the name of a holder, not the original party, without an indorsement by the payee. The application of this principle seems to be decisive against the right of the plaintiff alone to maintain this action. The action is brought by Estabrook upon a note made to a copartnership, Estabrook & Richmond, promising them, by the name of their copartnership, to pay them or order a certain sum of money. That this action cannot be maintained by the plaintiff, as payee of the note, is obvious; as that would at once present a case where there was an omission to join all the payees as plaintiffs, which would be fatal to the action. The only question, therefore, is, whether this note is legally indorsed, so as to enable the plaintiff to maintain the action as indorsee?

The payees of the note are Estabrook & Richmond, who compose a partnership. An indorsement of the note by the payees would, therefore, be an indorsement by Estabrook & Richmond, and this would correspond with the form of the note, and transfer the same to their indorsee. One partner might properly transfer the note by indorsement; but he must do it by indorsing the partnership name. Anything less than this seems to be an irregularity, and a departure from the legitimate mode of transfer of a negotiable note or bill, payable to the order of a copartnership.

It is not contended that the indorsement by Richmond alone would have been sufficient to authorize an action in the name of a third person as indorsee; but it is urged that such indorse-

ment is sufficient to authorize an action by the other partner, Estabrook, as indorsee. The position taken is that Richmond, by his indorsement, has parted with all his interest, and so vested the entire note in Estabrook. This may be all true, as between Richmond and Estabrook, and might be quite sufficient to settle, as between them, to whose use this money was to be held when collected. But the question still recurs as to the effect of such an indorsement as against the maker of the note, and whether it creates the legal relation of indorsee.

As already remarked, the present action, if maintainable at all, is maintainable by Estabrook as indorsee of the note. To constitute a legal indorsement, the payees Estabrook & Richmond must be the indorsers. But no such indorsement has ever been made. No one has professed to indorse the note in the partnership name. The only indorsement is that of Richmond individually; and although it might be quite competent for the payees, Estabrook & Richmond, in their partnership name, to have indorsed it to Estabrook, yet they have not done so.

We have found no authority for maintaining an action by an indorsee under such circumstances. The case of *Goddard v. Lyman*, 14 Pick. 268, which seems to be the most favorable case cited to sustain the position taken by the plaintiff, was widely different from the present case. In that case, although the original indorsement was by two only of three payees, and made to the other payee and a third person, yet it was subsequently indorsed by the third payee, and came to the hands of the plaintiff, who instituted the suit with the indorsement of all the payees. That case, upon its facts, does not, therefore, furnish any precedent for this case; although some of the remarks, as found in the opinion of the court might seem to indicate a broader doctrine than the case required.

The plaintiff then had leave to amend, on terms, by joining the other partner, and had judgment for the amount of the note.

INDORSEMENT BY ONE JOINT PROMISER FOR HIMSELF AND HIS CO-PROMISER, without special authority, transfers no title to the note: *Lowell v. Redding*, 23 Am. Dec. 545.

AUTHORITY OF PARTNER TO INDORSE FOR FIRM: See note to *New York Firemen Ins. Co. v. Bennett*, 13 Am. Dec. 117.

ESTABROOK v. SMITH,

(6 GRAY, 572.)

NO BREACH OF COVENANT AGAINST INCUMBRANCES occurs from fact that grantor held the land on a condition to erect a house thereon within a certain time.

TO MAINTAIN ACTION ON COVENANT OF WARRANTY, plaintiff must show eviction or what is tantamount thereto.

EXCEPTION OF MORTGAGE IN COVENANT AGAINST INCUMBRANCES IS NOT EXTENDED TO COVENANT OF WARRANTY, since the two covenants are not connected covenants of the same import, and directed to one and the same object.

PAYMENT BY GRANTEE OF MORTGAGE AGAINST WHICH HE COULD NOT MAKE ANY LEGAL DEFENSE, for the purpose of preventing an actual eviction, entitles him to an action on a covenant of warranty.

GRANTEE MAY RECOVER, IN ACTION FOR BREACH OF COVENANT OF WARRANTY, where he has paid off a mortgage, to prevent actual eviction, the whole amount of the mortgage, and interest thereon, where it was paid before the trial, even though it was paid after he conveyed the estate to another, who undertook to pay the mortgage as part of the consideration of the conveyance.

PAROL EVIDENCE THAT GRANTEE WAS TO TAKE CONVEYANCE SUBJECT TO OUTSTANDING MORTGAGE, or that he paid little or no consideration, is not admissible to control a covenant of warranty in an action for a breach thereof.

ACTION of contract on covenants in a deed from the defendant to the plaintiff, expressing a consideration of six hundred dollars. There was a covenant that the premises "are free of all incumbrances, except a mortgage to Spencer Field for three hundred and sixty-eight dollars and eighty-five cents," and a covenant to "warrant and defend the same premises to the said E. R. Estabrook, his heirs and assigns forever, against the lawful claims and demands of all persons." The declaration counted first upon a breach of the covenant against incumbrances, on the ground that the premises were subject to a condition in the deed, from the defendant's grantor to the defendant, that a dwelling-house should be built thereon within a year from the date of that deed; and secondly, upon a breach of the covenant of warranty, on the ground that the plaintiff had been obliged to pay off Field's mortgage. The house was erected within the year, but after the date of the deed declared on. A witness for the plaintiff, one John Field, testified that he was the agent of Spencer Field, and duly demanded of the defendant Smith the payment of the interest on the Field mortgage at about the time the first installment fell due; that the plaintiff soon after called on him and told him the interest would be

paid, and he then told the plaintiff that his instructions were, if the interest and payments were not made when due, a suit for possession would be commenced; that before the commencement of this suit the plaintiff paid him the interest due and part of the principal, leaving the balance of the principal, amounting to two hundred and thirty-one dollars and ninety-eight cents, and this balance the plaintiff paid him after the commencement of this suit on the day before the trial. The defendant offered evidence tending to show that when he made the deed declared on it was agreed between him and the plaintiff that the plaintiff and his mother should furnish him with money sufficient to erect the dwelling-house on the premises, and take a deed of the premises as they then were, or hold the same as security for the money so advanced; and it was agreed that when the house was erected the plaintiff might sell the premises if the defendant did not reimburse him, and repay himself and his mother the money advanced; that the deed was made and the house built, toward which the defendant furnished labor and materials to a considerable amount, and that after the erection of the house, and before bringing this suit, the plaintiff sold the property to one Barrows, and that the existence and amount of the mortgage were known to the plaintiff when he took the deed, and he was by agreement to take the premises subject to this mortgage; that no other consideration was paid by the plaintiff for the deed, and when he sold the property he received more than enough to reimburse himself and his mother for the money advanced and to satisfy the mortgage debt. The plaintiff objected to this evidence, and it was rejected. The defendant put in evidence the deed from the plaintiff to Barrows, in which the consideration named was two thousand five hundred dollars, and Barrows agreed to pay upon the mortgage two hundred and sixty-eight dollars and eighty-five cents, and cause the same to be discharged, and to hold the premises in trust for the payment of the mortgage. The defendant requested instructions that there was no breach of either covenant declared on, and that if the plaintiff was entitled to recover anything under the covenant of warranty he could recover only so much as he had paid before his deed to Barrows. But the court instructed that there was a breach of the covenant against incumbrances for which the plaintiff was entitled to nominal damages, and that if the testimony of John Field were true, it showed a breach of the covenant of warranty, for which the plaintiff was entitled to recover the full amount of the mortgage, as he

had paid it before the trial. Verdict by consent for the plaintiff, and exceptions by the defendant.

E. Washburn, for the defendant.

D. Foster, for the plaintiff.

By Court, METCALF, J. The court are of opinion that the plaintiff cannot maintain this action on the covenant against incumbrances. The condition as to the erection of a house made the estate defeasible; but this was not an incumbrance, within the legal meaning of the covenant against incumbrances; nor has the estate been defeated by breach of that condition. This action can be maintained, if at all, only on the covenant of warranty. To maintain an action on that covenant, the plaintiff must show an eviction, or what is tantamount to an eviction. And this is shown by the facts. The plaintiff paid a mortgage on the land against which he could not make any legal defense, and thus bought in a paramount right, for the purpose of preventing an actual eviction. This entitles him to an action on the covenant of warranty unless that covenant is to be restricted in the manner insisted on by the defendant: *Whitney v. Dinamore*, 6 Cush. 128, 129, and cases there cited.

The defendant insists that the exception of the mortgage in the covenant against incumbrances extends to the covenant of warranty; so that the plaintiff's claim is excepted from the latter covenant against the lawful claims of all persons, just as it would have been if to that covenant, as it stands in the deed, had been added the words, "except against those claiming under the mortgage above named."

The question how far and in what instances words of restriction or qualification, annexed to one covenant in a deed conveying real estate are to be extended to other covenants therein, was discussed by Parker, J., in *Sumner v. Williams*, 8 Mass. 214 [5 Am. Dec. 83]; and the adjudged cases have since been fully collected and compared in Sugden on Vendors, c. 14, sec. 3; Platt on Covenants, c. 11, sec. 7; and Rawle on Covenants, c. 10. It would therefore be a superfluous labor in this case to comment on those numerous decisions and the distinctions between them.

We need do no more than to state the ground of the opinion which we have formed, that the defendant's covenant of warranty is not restricted nor limited by his restricted covenant against incumbrances. That ground is, that the two covenants are not connected covenants of the same import, and directed to one

and the same object. This point was adverted to by Sewall, J., in *Sumner v. Williams*, *supra*, and in some of the earliest English decisions on this subject, and is illustrated and applied in the case of *Howell v. Richards*, 11 East, 633. There it was decided that the covenants for good title and for right to convey, "notwithstanding any act done by the grantors," did not restrain nor qualify the succeeding covenant for quiet enjoyment, "without the lawful let or disturbance of the grantors, or their heirs or assigns, or of any other person or persons whatsoever." We refer to the whole of Lord Ellenborough's opinion, quoting only the following passages: "The covenant for title, and the covenant for right to convey, are connected covenants, generally of the same import and effect, and directed to one and the same object; and the qualifying language of the one may therefore properly enough be considered as virtually transferred to and included in the other of them. But the covenant for quiet enjoyment is of a materially different import, and directed to a distinct object." "And it is perfectly consistent with reason and good sense that a cautious grantor should stipulate in a more restrained and limited manner for the particular description of title which he purports to convey than for quiet enjoyment." "He may very readily take upon him an indemnity against an event which he considers as next to impossible, whilst he chooses to avoid a responsibility for the strict legal perfection of his title to the estate, in case it should be found at any future period to have been liable to some exception at the time of his conveyance. He may have a moral certainty that the existing imperfections will be effectually removed by the lapse of a short period of time, or by the happening of certain immediately impending or expected events of death, or the like. But these imperfections, though cured so as to obviate any risk of disturbance to the grantees, could never be cured by any subsequent event, so as to save a breach of his covenant for an originally absolute and indefeasible title. The same prudence, therefore, which might require the qualification of one of these covenants, might not require the same qualification in the other of them, affected as it is by different considerations, and addressed to a different object:" See also *Smith v. Compton*, 8 Barn. & Adol. 189; and *Kean v. Strong*, 9 Irish Law Rep. 74, 82.

So in the case at bar, the defendant might well covenant to warrant against the eviction of the plaintiff by the holder of the mortgage, though he could not covenant against all incumbrances

without rendering himself forthwith liable to an action, for nominal damages at least, for breach of such covenant. And by the terms of his deed he has covenanted against the eviction to which the plaintiff has been subjected. If, as the defendant offered to prove at the trial, the plaintiff agreed "to take the premises subject to said mortgage," then that agreement should have appeared in some way in the deed or in some other written instrument. It was as easy to except the claim on the outstanding mortgage from the covenant of warranty as from the covenant against incumbrances, if such was the understanding of the parties. But nothing is clearer than that the parol evidence, which was offered to control the covenant in the deed, was inadmissible.

The plaintiff is to have judgment for damages to the amount of the mortgage debt and interest thereon. He has been damaged to exactly that amount.

Exceptions overruled.

COVENANT AGAINST INCUMBRANCES BROKEN BY EXISTENCE OF OUTSTANDING MORTGAGE: *Reed v. Pierce*, 58 Am. Dec. 761; or by prior lease: *Grice v. Scarborough*, 42 Id. 391.

EVICION OR ITS EQUIVALENT IS NECESSARY TO SUSTAIN ACTION FOR BREACH OF COVENANT OF WARRANTY: *Bank of Utica v. Merceron*, 49 Am. Dec. 189; *Johnson v. Nyce's Ex'rs*, Id. 444; *Surget v. Aright*, Id. 46; *Davis v. Smith*, 48 Id. 279, and cases cited in the notes. What constitutes an eviction, see note to *Dennis v. Heath*, 49 Id. 53; *Logan v. Moulder*, 33 Id. 345; see also *Higgins v. Johnson*, 60 Id. 544.

MEASURE OF DAMAGES FOR BREACH OF WARRANTY OF TITLE TO LAND is purchase money with interest from the time of the purchase: *Davis v. Smith*, 48 Am. Dec. 279; *Elliott v. Thompson*, 40 Id. 630; *Clark v. Parr*, 45 Id. 529; note to *Logan v. Moulder*, 33 Id. 345. But the damages will be nominal if before recovery against the warrantor he obtains title: *Baxter v. Bradley*, 37 Id. 49.

PAROL EVIDENCE TO SHOW THAT GRANTOR DID NOT WARRANT AGAINST PARTICULAR INCUMBRANCE, where the conveyance covenants against all incumbrances, cannot be received: *Grice v. Scarborough*, 42 Am. Dec. 391.

THE PRINCIPAL CASE IS CITED to the point that an exception in a covenant against incumbrances does not affect a covenant of warranty: *Ruggles v. Barton*, 16 Gray, 152. In *Sherman v. Williams*, 113 Mass. 496, it was held that the erection of a wall upon leased premises by the authority of the lessor was a breach of the covenant for quiet enjoyment, and the principal case was referred to.

CLARK v. HOLDEN.

[7 GRAY, 8.]

WHAT IS WASTE.—Cutting timber and other wood on wood and timber land held by tenant for life, and for purposes other than the use of the estate, is waste; although the object is to restore the land to pasture, as it originally was when the life estate commenced; and although it might have been good husbandry in an owner of the fee to have so restored it.

WHAT IS NOT WASTE.—Changing estate from pasture to woodland by tenant in dower, in suffering wood to grow up on land which was pasture before, is not waste.

REVERSIONER OF LAND HELD IN DOWER IS OWNER OF GROWING WOOD AND TIMBER THEREON, except enough for use of life estate; has a full right to dispose of it; and when severed, it becomes the personal property of reversioner, who may enter and take it away.

TRESPASS for breaking and entering plaintiff's close and carrying away twenty cords of wood from a tract of land set off to Hannah Marshal, widow of Josiah Marshal, as her dower. When this allotment was made, part of the tract was woodland and the remainder pasture-land. After Josiah's death, the pasture-land was allowed, through nature's changes, to become covered with a growth of young wood timber. In the winter of 1849-50, plaintiff, tenant of widow, cut about forty cords of wood thereon, all that was then worth cutting, under an agreement with the widow that he should receive one half of the wood. He removed his half of the wood to another portion of the land and piled it up. Holden, the reversioner, entered with the other defendants and carried the wood away. The following instruction for defendant was refused: "That inasmuch as the widow had suffered the pasture-land to become woodland, neither she nor any person claiming under her could use such woodland for any purpose for which she could not have used woodland which was such when set off to her; and also, that the widow had no right to give to the plaintiff any part of the wood in payment for cutting the same; and that the wood cut by the plaintiff under such an agreement did not vest in him, but remained the property of the reversioner." But the jury was instructed: "That if the widow did suffer the said pasture-land to become woodland, it was waste, for which Holden might have obtained a forfeiture of the place wasted, if he had seasonably entered; that if the widow cut, or caused to be cut, the said wood for sale, or for any purpose except for use upon the dower estate, or to restore the said woodland to pasture-land, it was waste, and the defendants were not liable for taking such wood; but that if, before an entry by Holden,

the widow in good faith cut, or caused to be cut, the wood standing upon land which had thus become woodland, with the intention of restoring such land to pasture-land, she was justified in so doing, and the defendants were liable for taking the wood when cut; and also that the burden of proof was upon the defendants to show that the said wood was not cut for the purpose of restoring the land as aforesaid; but that if said pasture had not grown up to woodland the widow would have a right to clear up such pasture, and the small wood so cleared off would not belong to Holden." Verdict for plaintiff, and defendants excepted.

J. P. Converse, for the defendants.

B. F. Buller, for the plaintiff.

By Court, BICKLOW, J. The court erroneously ruled that changing the estate from pasture to woodland by the tenant in dower, by suffering wood to grow up on land which was pasture before, was waste: *Pyncheon v. Stearns*, 11 Met. 304 [45 Am. Dec. 207]. As that instruction, however, was in favor of the defendant, it would be no ground for granting him a new trial.

But there was an essential error in the instructions of the court which diverted the attention of the jury from the real issue, and tended to prejudice the defendants' case. The justification on which they rested their defense was, that the wood claimed by the plaintiff under his agreement with the tenant in dower in fact belonged to the owner of the fee, because in cutting it she had committed waste. This was the only question before the jury. As the defendants were bound to establish their justification, the burden was on them to show that in cutting the wood in controversy a lasting damage had been done to the freehold or inheritance. But they were not bound to prove anything beyond this. The intent or motive with which the tenant in dower acted was wholly immaterial to this issue. A tenant for life cannot pull down buildings, cut off timber trees, or do other acts which tend to the disherison of the remainderman or reversioner, and justify them on the ground that he acted in good faith, without any purpose of permanently injuring the estate. Such acts, in law, constitute waste, for which the tenant for life is liable, however innocent or honest may have been the purpose with which they were done. It was therefore clearly erroneous in the judge to instruct the jury that the defendants were bound to show that the cutting of the wood by the tenant in dower was not done in good faith.

Exceptions sustained.

A new trial was had, in which the evidence and instructions asked for by defendant were the same as at the former trial. The instructions requested were refused, but the jury was instructed "that it was a question of fact for the jury whether the cutting of the wood was in accordance with good husbandry; that if it was, the widow, or her servant or agent, was justified in so doing, and the defendants were liable for taking said wood." Verdict for plaintiff, and defendants excepted.

By Court, SHAW, C. J. Upon the facts appearing in the bill of exceptions, the court are of opinion that although the land was pasture when it was set off to the widow as dower, yet if she permitted it to become woodland, bearing a growth fit for timber, and it was *de facto* such woodland when the wood and timber were cut, such cutting was waste, in the same manner and to the same extent as it would have been had it been woodland of the same description when it was set off to her as dower. It was wood and timber land when the timber was cut; it was held by a tenant for life; and therefore, cutting timber and other wood for purposes other than the use of the estate, for timber and fuel, by tenant for life, was waste. The wood and timber, when severed, became by law the personal property of Holden, who was the reversioner, having the next right to enter and become seised; and therefore he was justified in entering the close and taking the wood, which was thus his property. The tenant in dower had no right, after the land had become covered with a growth of wood and timber by her permission, to cut it, beyond the amount required for the estate itself, even though it might have been good husbandry in an owner in fee thus to take off the wood and timber, clear up the land, and thus again bring it under cultivation. Such owner in fee would be the owner of the wood and timber, with a full right of disposing of it; but in case of the land held in dower, the reversioner is the owner of the growing wood and timber, with a qualified interest in the soil sufficient to its nourishment and growth, which right the tenant in dower cannot legally defeat. The judge who tried the cause having instructed the jury otherwise, the verdict is set aside, and a new trial granted.

WHAT IS WASTE: *Ward v. Sheppard*, 2 Am. Dec. 625; *Wilds v. Layton*, 12 Id. 91; *Duvall v. Waters*, 18 Id. 350; *Johnson v. Johnson*, 29 Id. 72; note to *Governor v. Withers*, 50 Id. 102; *Clemence v. Steere*, 53 Id. 621; *Smith v. Sharpe*, 57 Id. 574; *Smith v. City Council of Rome*, 63 Id. 298.

WHAT IS NOT WASTE: *Pyncheon v. Stearns*, 45 Am. Dec. 207; *Clemence v. Steere*, 53 Id. 621.

DOWAGER IS NOT GUILTY OF WASTE, WHEN: *Crouch v. Puryear*, 10 Am. Dec. 528; *Owen v. Hyde*, 27 Id. 467.

REVERSIONER CAN MAINTAIN ACTION AGAINST LIFE TENANT for damage to or waste of the freehold: *Ripka v. Sergeant*, 42 Am. Dec. 214; *Olemence v. Steere*, 53 Id. 621.

THE PRINCIPAL CASE WAS CITED IN *Phillips v. Allen*, 7 Allen, 116, to the point that wood and timber, when severed by a tenant for life, at once became the property of plaintiff, as the person holding the estate in remainder; and in *Leonard v. Stickney*, 131 Mass. 545, that by the illegal act of tenant for life, the remainderman is invested with the right to property to which otherwise he would have no claim except at the termination of the tenancy.

COLLIER v. PIERCE.

[7 GRAY, 12.]

RIGHT TO AIR AND LIGHT IS NOT ACQUIRED BY PURCHASER OF LOT on which stands a building with a window overlooking an adjacent lot, and placed in the wall close to the dividing line between the two, where the owner of the lots sells them both by auction on the same day, with the privileges and appurtenances belonging to each, and though the sale and conveyance to him respectively precede the sale and conveyance of the other lot.

ACTION of tort for obstructing the access of light and air to a window in plaintiff's shop. The lot on which the shop stood, as well as an immediately adjoining one, was owned by the Concord Mill-dam Company. On April 25, 1853, the company sold both lots at auction, and deeds were soon afterwards given to them, with all the privileges and appurtenances belonging to them. The opinion gives the other facts of sale. When the sale was made, there was a window in the plaintiff's shop standing upon the first lot sold, and looking out upon the other lot having no building upon it. Soon after the conveyance to defendant, he erected a building upon the latter lot, touching plaintiff's shop, and entirely obscuring the window, which was the wrong sued for.

J. G. Abbott and S. A. Brown, for the plaintiff.

G. M. Brooks, for the defendant.

By Court, SHAW, C. J. The present case involves no question respecting the right which the owner of a building may claim for light and air through one or more windows, from and over the land of another, by actual use and enjoyment for a required length of time. The question turns wholly upon the construction of the deed from the Concord Mill-dam Company to the

plaintiff, and that question is whether, by implication, any right to air and light was granted by that deed to the plaintiff.

The material facts are that this corporation, being the owners of land including the respective lots now held by the plaintiff and the defendant, offered the land for sale by auction, in lots designated by metes and bounds. The lots were put up for sale and sold on the same day, one purchased by the plaintiff, the other by the defendant, that to the plaintiff being bid off first, and subsequently deeds given accordingly, that to the plaintiff being first. Neither by the terms of sale nor by the deeds was any specific easement for air or light expressed to be granted or reserved to one over the other. Under these circumstances, we think the plaintiff did not acquire a right by implication to air and light over the lot granted to the defendant, at the same sale, through the aperture for a window in the wall on the dividing line.

There having been, up to the time of the sale, a unity of title in the whole parcel, no easement had been acquired by one over the other. The allotment and sale proposed a new mode of holding, and for purposes different from those under which it had been previously occupied. The sale was much more like a partition than a grant by one proprietor of part of his estate, retaining the residue. If it had been intended to subject one to a servitude in favor of another, it is strange that it was not expressed, especially as such a sale, which it was quite competent for the owner to make, would have a tendency to enhance the price of the one and reduce that of the other. We cannot distinguish it from the case of *Johnson v. Jordan*, 2 Met. 239 [38 Am. Dec. 85]. There it was found that the actually existing drain was not necessary for the use of the tenement for which it was claimed. And in the present case, it does not appear that the window in question is necessary to the convenient enjoyment of the plaintiff's tenement.

A case similar in some respects to this was cited for the plaintiff: *Swansborough v. Coventry*, 9 Bing. 305. But in that case the tenement was sold as a dwelling-house, "with all the lights, easements, rights, privileges, and appurtenances, to the same belonging, or in any way appertaining." The right to lights, therefore, as they then actually existed, was thus expressly granted.

In the present case, we are of opinion that the plaintiff did not acquire the right to air and light through the window in question, from and over the defendant's land, by implication, as a

necessary incident, and therefore that this action for obstructing it cannot be maintained.

Judgment for the defendant.

ANCIENT LIGHTS DEFINED: See exhaustive note to *Pierre v. Fernald*, 46 Am. Dec. 578. The English law was, that an action lay for their obstruction, but this is no part of the American law: *Id.*; although in *Mahan v. Brown*, 28 Id. 461, it was held that the obstruction of ancient lights is ground for an action on the case. In *Robeson v. Pittenger*, 32 Id. 412, it was held that such threatened obstruction would be enjoined; but in *Woodruff v. Johnson*, 55 Id. 246, it was held that building so as to shut up an alleged ancient window in a house erected on the line of a lot would not be enjoined.

EASEMENT OF LIGHT AND AIR IMPLIED: *Story v. Odin*, 7 Am. Dec. 46; *Livingston v. Mayor of New York*, 22 Id. 622. For discussion of this matter, see extensive notes to *Story v. Odin*, 7 Id. 49; *Robeson v. Pittenger*, 32 Id. 416; *Mahan v. Brown*, 28 Id. 463.

THE PRINCIPAL CASE WAS CITED in *Royce v. Guggenheim*, 106 Mass. 205, to the point that in the commonwealth of Massachusetts no easement of light and air exists over adjoining lands unless by express grant or covenant; and in *Randall v. Sanderson*, 111 Id. 120, that as no easement was expressly granted in the deed there mentioned, the plaintiffs showed no easement of light and air over defendant's land. A historical allusion was made to the principal case in *Keals v. Hugs*, 115 Id. 213.

PARKER v. HUNTINGTON.

[7 GRAY, 36.]

CONCLUSIVE EVIDENCE OF PROBABLE CAUSE.—Conviction of party by jury, though the verdict was obtained by false testimony, and afterwards set aside for newly discovered evidence and a verdict of not guilty returned, is conclusive evidence of probable cause in a subsequent action for malicious prosecution.

NO CIVIL ACTION LIES FOR INJURY CAUSED BY PERJURY, except in cases in which it is expressly given by statute.

ACTION of tort, commenced against George F. Farley, since deceased, and defendant, for malicious prosecution of plaintiff for perjury. Plaintiff, on the trial, offered to prove that, at the time of said prosecution, Huntington, then district attorney, obtained, with collusion of Farley, and by the latter's false testimony, an indictment against plaintiff for perjury, knowing it to be without probable cause, and had plaintiff arrested and tried thereon. The record of that prosecution showed that the indictment contained two counts, alleging the same perjury on two distinct occasions; that plaintiff was tried upon both, convicted, and appealed on exceptions, which were overruled; that

afterwards a new trial was obtained, on the ground of newly discovered evidence, on which new trial the jury disagreed; that he was tried again, and acquitted by the jury upon the only count submitted to them; and that a *nolle prosequi* was entered on the other. Notwithstanding this record, plaintiff offered to prove that the prosecution was malicious and without probable cause; that the *nolle prosequi* was entered because of said acquittal; and that more than six years had elapsed since the alleged perjury. The court below ruled that the evidence would not sustain the action, and directed a verdict for defendant.

B. F. Butler, for the plaintiff.

J. G. Abbott, for the defendant.

By Court, METCALF, J. There is nothing in this case, as it now stands before us, which has not heretofore been decided against the plaintiff, in *Parker v. Farley*, 10 Cush. 279, and *Parker v. Huntington*, 2 Gray, 124, or at least intimated in the latter case to be insufficient to maintain his action. What we then intimated, we now adjudge. This case furnishes no exception to the rule, that a conviction of a party by a jury is conclusive evidence of probable cause for the prosecution. See also *Phelps v. Stearns*, 4 Gray, 195 [64 Am. Dec. 61], that an injury caused by perjury is not a legal ground of action.

Judgment on the verdict.

PROBABLE CAUSE, IN ACTION FOR MALICIOUS PROSECUTION, DEFINED: See note to *Bell v. Graham*, 9 Am. Dec. 691; extended note to *Frowman v. Smith*, 12 Id. 267, discussing the question as to what will support an action for malicious prosecution; and *Griffis v. Sellars*, 31 Id. 422. For references to the various branches of malicious prosecution, see collected cases in note to *Williams v. Foxmeter*, 41 Id. 649.

PROSECUTION IS TERMINATED BY ENTRY OF NOLLE PROSEQUI; accused may then sue for a malicious prosecution: *Yocum v. Polly*, 36 Am. Dec. 583.

CONVICTION BY TRIAL COURT IS CONCLUSIVE EVIDENCE of existence of probable cause to warrant prosecution, though the judgment of conviction is vacated on appeal: *Griffis v. Sellars*, 31 Am. Dec. 422. But in the note to *Frowman v. Smith*, 12 Id. 267, it is shown that the courts are divided upon this question.

ACTION WILL NOT LIE TO RECOVER DAMAGES FOR PERJURY COMMITTED TO PLAINTIFF'S INJURY: *Cunningham v. Brown*, 46 Am. Dec. 140; *Dunlap v. Glidden*, 52 Id. 625.

THE PRINCIPAL CASE WAS CITED in *Dennehey v. Woodsum*, 100 Mass. 197, to the point that a conviction before trial justice and acquittal on appeal does not show want of probable cause; but, on the contrary, is ordinarily held to be conclusive evidence of probable cause, and to defeat an action for malicious

prosecution, even when the first conviction is obtained by false testimony. The action embodied in the principal case was originally commenced in *Parker v. Farley*, 10 Cush. 279; and Huntington was afterwards joined as defendant in *Parker v. Huntington & Farley*, 2 Gray, 124. *Parker v. Farley*, 10 Cush. 279, was cited in *Brown v. Lakeman*, 12 Id. 482, to the point that an action for malicious prosecution, in causing plaintiff to be indicted or arrested and imprisoned on a lawful warrant obtained by misrepresentations, will not lie when the discharge from such indictment or prosecution has been terminated by *nolle prosequi*, if entered regularly and by the proper officer: *Coupal v. Ward*, 106 Mass. 290; in *Cardinal v. Smith*, 109 Id. 158, that when the prosecution alleged to have been malicious is by complaint in behalf of the government for a crime, and in pursuance thereof an indictment has been found and presented to a court having jurisdiction to try it, an acquittal by a jury must be shown; and a *nolle prosequi* entered by the attorney for the government is not sufficient, for the finding of the grand jury is some evidence of probable cause, and another indictment may still be found on the same complaint; in *Kidder v. Parkhurst*, 3 Allen, 396, that want of probable cause cannot be inferred from the malice of the prosecutor; in *Dennet v. Woodrum*, 100 Mass. 196, to same point referred to by that case above; in *Graves v. Dawson*, 130 Id. 80, 81, it was referred to in a comprehensive discussion as to whether the entry of a *nolle prosequi* is or is not such a termination of a suit as authorizes the prosecuted party to maintain an action for malicious prosecution. In this case the court thought, as a matter of law, that it could not be said that the entry of a *nolle prosequi* is conclusive upon the rights of a party; and in *Graves v. Dawson*, 133 Id. 420, that "it has been decided in this commonwealth that a *nolle prosequi* of an indictment is not necessarily such a determination of the prosecution as will maintain an action of malicious prosecution;" *Parker v. Huntington*, 2 Gray, 124, was cited in *Hayward v. Draper*, 3 Allen, 552; *Randall v. Hazelton*, 12 Id. 414; *Bowen v. Matheson*, 14 Id. 502; *Rice v. Coolidge*, 121 Mass. 394, to the point that where the gist of the action is not conspiracy, but damage done by plaintiff to defendant, the averment that acts were done in pursuance of a conspiracy does not change the nature of the action, and if it cannot be sustained against one of the defendants it must fail, for if acts charged, when done by one alone, are not actionable, they are not made so by being done by several in pursuance of a conspiracy.

BARKER v. STETSON.

[7 GRAY, 53.]

SERVICE OF VOID PROCESS IS TRESPASS, for which the magistrate issuing it, and the officer serving it, are answerable.

PERSON WHO DOES NO MORE THAN TO PREFER COMPLAINT TO MAGISTRATE IS NOT LIABLE IN TRESPASS for acts done under the magistrate's process issuing thereon, though the latter have no jurisdiction.

ACTION of tort for entering plaintiff's shop and taking and carrying away from it two casks of intoxicating liquors. The entry and taking were denied by the answer. Plaintiff introduced evidence of the facts stated in the opinion, but became nonsuit, and excepted.

J. P. Converse, for the plaintiff.

B. F. Butler, for the defendants.

By Court, METCALF, J. The defendants made a complaint to a magistrate, under the statutes of 1852, c. 322, sec. 14, and therein prayed him to issue process for the seizure of the plaintiff's liquors; and they did nothing more. The magistrate issued the process, and an officer served it according to its precept. The section of the statute under which this process was issued being unconstitutional, the magistrate had no jurisdiction; the process was void, and the service of it was a trespass upon the plaintiff, for which the magistrate and the officer are answerable: *Fisher v. McGirr*, 1 Gray, 1 [61 Am. Dec. 381]; *Kelly v. Bemis*, 4 Id. 83 [64 Am. Dec. 50]. Are the defendants also answerable, in the form of action which the plaintiff has adopted? It is clear that they are not. The authorities are conclusive that when a person does no more than to prefer a complaint to a magistrate he is not liable in trespass for the acts done under the warrant which the magistrate thereupon issues, even though the magistrate has no jurisdiction. If the complaint is malicious, and without probable cause, the complainant may be answerable in another form of action: *Brown v. Chapman*, 6 C. B. 365; *Carratt v. Morley*, 1 Gale & Dav. 275; *Wright v. Tatham*, 1 Ad. & El. 18; *Cooper v. Harding*, 7 Id. 928; *West v. Smallwood*, 3 Mee. & W. 418, and Horn & H. 117; *Barber v. Rollinson*, 1 Crompt. & M. 330; S. C., 3 Tyrw. 266; see also a recognition of this doctrine by Lord Campbell, in *Chivers v. Savage*, 5 El. & Bl. 701.

Exceptions overruled.

JUDICIAL OFFICER IS NOT LIABLE for acts done by him while acting judicially and within the sphere of his jurisdiction: *Borden v. State*, 54 Am. Dec. 217, note 243; *Bailey v. Wiggins*, 60 Id. 650; *Deal v. Harris*, 63 Id. 686; *Billings v. Russell*, 62 Id. 330.

MAGISTRATE OF INFERIOR JURISDICTION WHO ACTS IN EXCESS OF OR WITHOUT JURISDICTION IS LIABLE IN DAMAGES to a party injured by his acts: *Piper v. Pearson*, 61 Am. Dec. 438, and note 441, discussing the liability of judicial officers: *Clarke v. May*, Id. 470, and note 473; *Deal v. Harris*, 63 Id. 686, and citations in note 688.

TRESPASS WILL LIE AGAINST OFFICER ACTING UNDER VOID PROCESS: *Fisher v. McGirr*, 61 Am. Dec. 381.

WRIT REGULAR ON ITS FACE protects a ministerial officer in its execution: *Billings v. Russell*, 62 Am. Dec. 330.

WHEN PROCESS IS JUSTIFICATION FOR ACTS DONE UNDER IT: See collected cases in this series in notes to *Fisher v. McGirr*, 61 Am. Dec. 409; *Billings v. Russell*, 62 Id. 332.

PARTY AT WHOSE INSTANCE MAGISTRATE HAS ACTED IS TRESPASSER, with respect to all acts done in execution of process issued by such magistrate in excess of his authority: *Barkeloo v. Randall*, 32 Am. Dec. 46; see *Emery v. Hapgood*, *infra*, and notes to same.

THE PRINCIPAL CASE WAS CITED IN *Emery v. Hapgood*, 7 Gray, 59, to the point that it is not the duty or within the power of a stranger to a warrant to cause it to be enforced; and that after the original complaint is made and signed, and testimony given in its support, his duty and responsibility are at an end.

EMERY v. HAPGOOD.

[7 GRAY, 55.]

PROCESS REGULAR AND VALID ON ITS FACE, THOUGH ACTUALLY VOID, WILL PROTECT OFFICER OBEYING ITS PRECEPT in accordance with the command of a court or magistrate apparently having jurisdiction of the case or subject-matter. This is founded on reasons of public policy, in order to secure a prompt and effective service of legal process.

STRANGERS, THIRD PERSONS, OR VOLUNTEERS ARE LIABLE IN TRESPASS for interfering, instigating, and causing the enforcement of unlawful process, though it may be regular and valid on its face. Public duty does not require such persons to assume the responsibility of executing legal process.

ACTION of tort for assault and false imprisonment. Plaintiff put in evidence a warrant, issued by Timothy Pearson, a justice of the peace, directing commitment of plaintiff to jail for contempt, committed while Pearson was acting as magistrate in trying certain complaints against plaintiff for violation of liquor laws. Also two complaints of like date, made by defendant, before Pearson, and against plaintiff, for alleged violation of liquor laws, together with the warrants issued thereon, and a record of the judgment of guilt in each case rendered by Pearson. The alleged contempt was committed on the trial of the second complaint, after the first had been disposed of. Hapgood was complainant in each case, and present at all the proceedings before Pearson. He told the officer, who hesitated about serving the warrant of commitment, to serve it, and that he would indemnify and save him harmless against damages; and that if he did not serve it he would be prosecuted. It appeared that it was in consequence of these statements and promises that the officer was induced to commit plaintiff on the warrant, and that he otherwise would not have done so. Plaintiff contended, upon these facts, that Pearson acted without any authority as a magistrate in all of said proceedings; that the warrant for contempt was bad on its face; and that defendant

was liable as a trespasser. Defendant contended: 1. That it did not appear from the complaints and warrants against Emery for the unlawful sale of liquor that Pearson acted without authority; 2. That if he did, the warrant for contempt was good on its face, and did not show any want of Pearson's authority; and that therefore neither the officer nor Hapgood could be liable in trespass for the service of the warrant. The court overruled defendant's objections, and instructed the jury that "said Pearson had no legal authority to issue said warrants; that in issuing them he had exceeded his jurisdiction; and that the defendant, if he instigated and induced the officer to commit the plaintiff on the warrant of commitment, when otherwise he would not have committed him, was liable in this action." The court also ruled that "defendant would be liable, though the warrant for contempt was sufficient on its face, if he so instigated and induced the officer to commit the plaintiff thereon, knowing that said Pearson had no authority or jurisdiction to hear and try said Emery on said complaints for illegal sale of liquor." Verdict for plaintiff.

J. G. Abbott, for the plaintiff.

B. F. Butler, for the defendant.

By Court, BICKLOW, J. The want of jurisdiction in the magistrate to try and determine the complaint originally made by the defendant against the plaintiff, and the invalidity of the commitment of the plaintiff for contempt, are fully settled in *Piper v. Pearson*, 2 Gray, 120 [61 Am. Dec. 438]. In that case the proceedings before the magistrate were similar to those in the case at bar.

The only question, therefore, arising in this case is whether, upon the facts proved, the defendant is liable as a trespasser. In deciding this question, it is unnecessary to determine upon the regularity of the form of the warrant of commitment. This is not an action against an officer for serving the warrant, or against a person acting by or under his authority or sanction; if it were, it would be essential to consider whether the warrant was bad on its face, and disclosed the want of jurisdiction in the magistrate who issued it. For reasons founded on public policy, and in order to secure a prompt and effective service of legal process, the law protects its officers, and those acting under them, in the performance of their duties, if there is no defect or want of jurisdiction apparent on the face of the writ or warrant under which they act. The officer is not bound to look

beyond his warrant. He is not to exercise his judgment touching the validity of the process in point of law; but if it is in due form, and is issued by a court or magistrate apparently having jurisdiction of the case or subject-matter, he is to obey its command. In such case, he may justify under it, although in fact it may have been issued without authority, and therefore be wholly void.

But such is not the rule applicable to strangers or third persons, who are not required in the exercise of a public duty to assume the responsibility of executing legal process. If they interfere of their own motion, without authority or command from the officers of the law, to cause a writ or warrant to be enforced, they act at their peril; and if the process, though regular on its face and apparently good, was unauthorized, or was issued by a tribunal having no jurisdiction, or acting beyond the scope of its power, they are liable for the consequences arising from the enforcement of unlawful process. It is upon this ground that a party is held responsible, at whose suit execution is made, when the officer serving it incurs no liability. The rule is, that if a stranger voluntarily takes upon himself to direct or aid in the service of a bad warrant, or interposes and sets the officer to do execution, he must take care to find a record that will support the process, or he cannot set up and maintain a justification: *Barker v. Braham*, 3 Wils. 376; *Parsons v. Loyd*, Id. 341; *Bryant v. Clutton*, 1 Mee. & W. 408; *West v. Smallwood*, 3 Id. 418; *Codrington v. Lloyd*, 8 Ad. & El. N. S., 449; *Carratt v. Morley*, 1 Id. 18; *Green v. Elgie*, 5 Id. 114.

In the present case, the defendant was a volunteer in urging the officer to serve a void warrant upon the plaintiff; and under the instructions given to the jury, it is found by their verdict that the plaintiff would not have been committed to jail but for his interference and instigation. He was, in a legal sense, a stranger to the warrant. It was not his duty, or within his province, to cause it to be enforced. After having made and signed the original complaint, and testified in its support before the magistrate, his duty and responsibility were at an end: *Barker v. Stetson*, 7 Gray, 53 [*ante*, p. 457]. He cannot, therefore, shelter himself under the authority of the officer, and claim immunity on the ground that the warrant was regular, and disclosed no want of jurisdiction in the magistrate. But it being apparent by the record that the warrant was illegally issued and void, the defendant is responsible for the trespass which he caused to be committed upon the plaintiff.

Judgment on the verdict.

WHEN PROCESS IS JUSTIFICATION FOR ACTS DONE UNDER IT: See *Barker v. Stetson*, ante, p. 457, and notes thereto referring to collected cases in this series.

PARTY AT WHOSE INSTANCE MAGISTRATE HAS ACTED IS TRESPASSER with respect to all acts done in execution of process issued by such magistrate in excess of his authority: *Barkeloo v. Randall*, 32 Am. Dec. 46; see *Barker v. Stetson*, ante, p. 457. Party falsely, maliciously, and without probable cause suing out process against another, and causing his imprisonment, commits a tort, and is answerable therefor in damages: *Plummer v. Dennett*, 20 Am. Dec. 318. In *Bailey v. Wiggins*, 60 Id. 650, it was held that a justice of the peace who causes innocent person accused of crime to be arrested and imprisoned is not guilty of trespass; but in *Crumpton v. Newman*, 48 Id. 251, it was held that a person arrested under a warrant which does not disclose any offense known to the law may maintain an action of trespass against the persons who caused his arrest. Yet void process must be set aside or vacated before trespass can be maintained against the party who caused it to issue, for acts done under it: *Day v. Sharp*, 34 Id. 509.

THE PRINCIPAL CASE WAS CITED in *Tyler v. Pomeroy*, 8 Allen, 506, to the point that a complainant who obtains a warrant from a magistrate having no jurisdiction, and induces an officer to arrest the party complained of, is liable in damages to the party arrested; and in *Rice v. Coolidge*, 121 Mass. 396, that such a person is liable to an action of tort therefor, although the officer who served the warrant is protected from an action for reasons of public policy.

FULLAM v. NEW YORK UNION INSURANCE CO.

[7 GRAY, 61.]

PARTIES TO CONTRACT OF INSURANCE MAY, BY EXPRESS STIPULATION, LIMIT TIME within which an action must be brought thereon to a shorter period than that prescribed by the general statute of limitations.

INSURANCE CONTRACT, LIMITING TIME IN WHICH TO SUE, IS EQUALLY BINDING BETWEEN PARTIES, in Massachusetts, whether the insurers are a stock company or a mutual insurance company, established by the laws of that commonwealth or of any other state.

TO RELIEVE PARTY FROM HIS OWN EXPRESS CONTRACT OF INSURANCE, limiting time in which suit must be brought, bad faith or unreasonable delay must be shown on the part of insurers. In the absence of such evidence, a suit commenced after the stated time agreed upon will be barred.

ACTION of contract on a stock policy against loss by fire, issued in New Hampshire by an insurance company incorporated by the laws of New York. Across the face of the policy was printed this clause: "It is also agreed that this policy is made and accepted, subject to and in reference to the terms and conditions hereto annexed as forming part of this policy, which are to be used and resorted to to explain or ascertain the rights and obligations of the parties hereto in all cases not herein

otherwise provided for." By the ninth condition of the "terms and conditions of insurance," the assured was allowed one month in which to furnish proofs of loss; and the loss was not payable until three months after "examinations, investigations, appraisals, and due proofs of loss, amended and completed," should have been filed in the office of the insurance company. The twelfth condition provided that no suit or action of any kind should be sustainable, either in law or equity, unless commenced within the term of six months next after the loss or damage occurred; and that if such suit were brought after that period, the lapse of time should be taken and deemed conclusive evidence against the validity of the claim sought to be enforced. The property insured was destroyed by fire on July 21, 1853. Notice thereof was given, and a sworn statement filed with defendants, August 17, 1853. Action was commenced August 10, 1854. The question was whether it was brought in time. It was argued that defendants, by delaying the examination and appraisal for more than two months after the loss, might entirely defeat the plaintiff's right to recover, and that the limitation of six months was void, because it was in restraint of right, contrary to public policy, and unreasonable.

B. F. Butler, for the plaintiff.

G. T. Davis and C. Allen, for the defendants.

By Court, METCALF, J. It is now well settled that the parties to a contract of insurance may, by express stipulation, admit the time within which an action must be brought thereon to a shorter period than that prescribed by the general statute of limitations. As such a provision takes effect as a contract between the parties, it is equally binding, whether the insurers are a stock company or a mutual insurance company, established by the laws of this commonwealth or of any other state: *Cray v. Hartford Fire Ins. Co.*, 1 Blatchf. 280; *Ketchum v. Protection Ins. Co.*, 1 Allen (N. B.), 136; *Wilson v. Aetna Ins. Co.*, 27 Vt. 99; *Amesbury v. Bowditch Mutual Fire Ins. Co.*, 6 Gray, 596.

There is no such unreasonableness in the provisions of this policy as to require or authorize the court to relieve the plaintiff from his own express contract in the absence of any evidence of bad faith or unreasonable delay on the part of the defendants. If the defendants had prevented this stipulation from being carried into effect, or had induced the plaintiff to believe that they did not intend to rely upon it, the case might be different: *Grant*

v. *Lexington Fire, Life, and Marine Ins. Co.*, 5 Ind. 26; *Ames v. New York Union Ins. Co.*, 14 N. Y. 264.

Judgment for the defendants.

LIMITATION OF TIME WITHIN WHICH SUIT MAY BE BROUGHT, agreed on by parties to contract of insurance, is valid: See note to *Grant v. Lexington Ins. Co.*, 61 Am. Dec. 81.

STIPULATION IN INSURANCE POLICY LIMITING TIME IN WHICH SUIT MUST BE BROUGHT cannot be set up by the company in bar of a suit brought after that time, where their own acts have contributed to the delay: *Grant v. Lexington Ins. Co.*, 61 Am. Dec. 74, and note 81.

LEX LOCI CONTRACTUS GOVERNS RIGHTS AND LIABILITIES OF PARTIES TO CONTRACT, unless another place is appointed for its performance: *Young v. Harris*, 61 Am. Dec. 170, and collected cases in this series in note to same 172.

CONTRACT VALID WHERE MADE WILL BE ENFORCED EVERYWHERE ELSE, unless clearly contrary to good morals, public policy, and positive institutions of the state: *Phinney v. Baldwin*, 61 Am. Dec. 62, and note 64; *Smith v. Godfrey*, 61 Id. 617, and note 622.

THE PRINCIPAL CASE WAS CITED in *Little v. Phœnix Ins. Co.*, 123 Mass. 389, in discussing the effect to be given to the limitation clause contained in the policy.

ROWELL v. CITY OF LOWELL.

[7 GRAY, 100.]

CITY OR TOWN IS NOT LIABLE TO PERSON INJURED by combined effect of defect in highway and negligence of third person.

CITY OR TOWN IS LIABLE TO PERSON INJURED BY DEFECT IN HIGHWAY, if the contributing cause is a pure accident, and one which common prudence and sagacity could not have foreseen and provided against.

ACTION of tort to recover damages for injury sustained by plaintiff from want of safety and repair of a sidewalk of Middle street, in the city of Lowell. Plaintiff's evidence tended to show that as she was passing out of the post-office building to Middle street she slipped from the steps, which were without the limits of the highway, to the sidewalk, and there continued slipping until she fell and received the injury complained of; and that both the steps and sidewalk were covered with ice, so as to be slippery and unsafe, and had remained so for more than twenty-four hours. Defendants' instruction, "that if the steps were in an unsafe condition, and she slipped from them, and they caused her fall, then she could not recover under this declaration, though the sidewalk might be unsafe," was refused, and the following one given: "That if the plaintiff was coming out of said building upon the street from said steps, the same

being in an unsafe condition, and though the defendants were not responsible for that condition of the steps, she being in the use of ordinary care, and after leaving said steps she stepped on said sidewalk, the same being also in an unsafe condition, and fell upon the sidewalk from the combined effect of slipping on the steps and said unsafe condition of the sidewalk, she was entitled to recover for the injury sustained by her fall." Verdict for plaintiff, and defendants excepted.

B. F. Butler and N. St. J. Green, for the defendants.

G. A. Somerby and P. Haggerty, for the plaintiff.

By Court, DEWEY, J. The case of *Palmer v. Andover*, 2 Cush. 600, is much relied upon to sustain the ruling in favor of the plaintiff in the present case. That case, although not having the weight of a unanimous opinion of this court, was deliberately considered and settled, and is to be taken to be the law of this commonwealth applicable to similar cases. In coming to the result we did in that case, we were fully aware of the difficulty of drawing a well-defined line between the cases where responsibility would and where it would not attach to the town, when the injury was occasioned in part by other causes than that of a defective highway. Each case as it occurs must be decided in that respect upon its own peculiar circumstances.

The case of *Palmer v. Andover*, *supra*, presented the case of a defective highway, and to such extent defective as not to be in proper repair for ordinary travel, for want of a suitable rail or barrier. It was also made to appear to the satisfaction of the jury that such rail or barrier thus required for security of the traveler would have prevented the happening of the injury complained of. The injury sustained in that case was the combined effect of an accident occurring to the carriage and the defect above stated in the road; the accident being one which common prudence and sagacity could not have foreseen and provided against. The damage occurred wholly on the highway, and with no co-operation nor through any negligence of a third party. The case was one where no duties had been neglected nor any defaults occurred on the part of any one, except the town of Andover. Under these circumstances, the court held that the plaintiff was entitled to maintain his action.

In the case now before us, another element is alleged to exist. The defendants allege that the injury to the plaintiff commenced by her feet slipping without the limits of the highway, for whose repair the defendants are responsible; that the slipping com-

menced upon the steps of the post-office building; that those steps were covered with ice, and were in an unsafe state; and that by reason of such unsafe state of those steps the plaintiff fell on the sidewalk, which was also covered with ice, and was unsafe for travel thereon. As to this, proof was offered and relied upon by the defendants. But the ruling of the court was to the effect that if both the steps and the sidewalk were in an unsafe condition, and the fall upon the sidewalk was the combined effect of slipping upon the steps and the unsafe condition of the sidewalk, and although the defendants were not responsible for the condition of the steps, the plaintiff was entitled to recover for the injury sustained by her fall.

We do not feel authorized to sustain so broad a principle as seems to have been adopted at the trial, as to the responsibility of towns for neglect to repair their highways. We think the ruling goes further than that of *Palmer v. Andover, supra*. It adopts the doctrine that the injury may result from the combined effect of negligent acts of omission or commission, inconsistent with ordinary care on the part of a third party, and an existing want of repair in the highway, and yet the town be charged with the damages occasioned by such injury thus proceeding in part from causes wrongfully existing without the limits of the highway.

But we think the only exception to the rule, that the plaintiff cannot recover unless the defect in the highway was the sole cause of the injury, must be one like that in *Palmer v. Andover, supra*, where the contributing cause was a pure accident, and one which common prudence and sagacity could not have foreseen and provided against. The contributing cause of the injury here was of a different character, involving default and negligence without the limits of the highway. If the injury was caused only through the combined effect of slipping upon the steps, which were out of repair and unsafe, and upon the sidewalk, which was also out of repair and unsafe, the defendants would not be responsible therefor.

New trial ordered.

LIABILITY OF CITIES AND TOWNS FOR INJURIES ARISING FROM DEFECTIVE HIGHWAYS: *Jones v. Inhabitants of Waltham*, 50 Am. Dec. 783, and notes 784; *Lund v. Inhabitants of Tyngsborough*, 59 Id. 159; *Kimball v. City of Bath*, 61 Id. 243, and cases cited in note thereto 245; *Griffin v. Mayor of New York*, Id. 700, and collected cases in note to same 706; *Browning v. City of Springfield*, 63 Id. 345, and note to same 350, discussing at length the liability of cities for neglect to repair streets. This note also contains a discussion of the liability of property owner for neglect to repair streets: See also *Savage v. Bangor*, Id. 658.

CONTRIBUTORY NEGLIGENCE BY PERSON INSURED BY DEFECT IN HIGHWAY.—What constitutes, and effect of in action against town: *Lund v. Tyngsborough*, 59 Am. Dec. 159; *Erie v. Schwingle*, 60 Id. 87; *French v. Brunswick*, 38 Id. 250. Party injured by defect in highway while not exercising ordinary care cannot recover against the town liable for the defect, unless the defect was the sole cause of the injury, and the burden of proving due care on his part is upon him: *Raymond v. City of Lowell*, 53 Id. 57, and notes to same 67.

THE PRINCIPAL CASE WAS CITED IN *Babson v. Inhabitants of Rockport*, 101 Mass. 98, and *Taylor v. Woburn*, 130 Id. 490, to the point that it is only when defect in highway is the sole culpable cause of injury that the town or city is liable; in *Richards v. Inhabitants of Enfield*, 13 Gray, 346, that town or city is not liable for injuries sustained on highway unless the accident is occasioned by causes which occurred entirely within the highway; in *Barber et ux v. City of Roxbury*, 11 Allen, 321, that a city or town is not liable for an injury suffered from slipping on steps without the limits of the highway upon the sidewalk, and there falling, when both steps and sidewalk were in an unsafe condition; in *Shepherd et ux v. Inhabitants of Chelsea*, 4 Id. 114, that a party injured by defect in sidewalk cannot recover damages from the city or town where the accident happened in part from the unlawful or careless act of a third person; in *Titus v. Inhabitants of Northbridge*, 97 Mass. 265, that defendants were not liable for an injury occasioned by action of a horse that was at the time of the accident unfit for use, and was beyond the driver's control, although the defect in the highway was also a cause of the injury; in *Kidder v. Inhabitants of Dunstable*, 7 Gray, 106, it was cited to first point in syllabus, *supra*. The principal case was quoted from, in *Alger v. City of Lowell*, 3 Allen, 405.

McCABE v. BELLOWES.

[7 GRAY, 148.]

TENANT IN DOWER, TO MAINTAIN BILL IN EQUITY TO REDEEM LAND FROM MORTGAGE made by her husband and herself, must offer to pay the whole amount due on the mortgage.

WIDOW'S DOWER IS BARRED, AS AGAINST MORTGAGEE, and so far as is necessary for the payment of the mortgage debt, where she joined with her husband in the mortgage.

WIDOW'S DOWER CAN BE ASSIGNED ONLY WHEN MORTGAGE DEBT IS PAID, OR WHERE MORTGAGEE DOES NOT OBJECT, where she joined with her husband in the mortgage security.

WIDOW IS ENTITLED TO DOWER IN MORTGAGED PREMISES AS AGAINST EVERY PERSON EXCEPT MORTGAGEE and those claiming under him, where she made the mortgage with her husband.

WIDOW MAY HAVE HER DOWER OF WHOLE ESTATE mortgaged by herself and husband, by repaying her proportion of the amount paid by one claiming under her husband, and who has redeemed; or she may have her dower according to the value of the estate, after deducting the amount paid for the redemption.

BILL in equity by a widow to redeem land from a mortgage made to Stephen S. Seavy by her husband, during coverture, and

in which she had released her right of dower. The husband, after the making of this mortgage, conveyed the land to defendant Bellows by deed, in which his wife did not join. Bellows took possession of the premises under a judgment in forcible entry and detainer against this plaintiff, and conveyed the land to the other defendant, and afterwards took an assignment of the mortgage from Seavy. Plaintiff offered to pay "her just proportion," but did not offer to pay the whole debt, which defendants claimed was necessary for plaintiff to maintain her bill.

I. S. Morse and A. C. Clark, for the plaintiff.

B. F. Butler, for the defendants.

By Court, THOMAS, J. It is quite plain that the plaintiff cannot redeem the estate except upon an offer to pay the whole amount due on the mortgage: *Gibson v. Crehore*, 5 Pick. 151-153; *Eaton v. Simonds*, 14 Id. 98; *Brown v. Lapham*, 3 Cush. 554. Having joined in the mortgage to secure the payment of the mortgage debt, she has barred herself of her right of dower, as against the mortgagee, and so far as is necessary for the payment of his mortgage. It is only when that debt is paid, or when the mortgagee does not object, that her dower can be assigned: *Henry's Case*, 4 Id. 257. She is entitled to dower in the mortgaged premises as against every person except the mortgagee and those claiming under him. If any person claiming under her husband has redeemed, she may repay her proportion of the amount so paid, and have her dower of the whole estate; or she may have her dower according to the value of the estate, after deducting the amount paid for the redemption: R. S., c. 60, sec. 2; *Newton v. Cook*, 4 Gray, 46. But as against the mortgagee she can only have dower by redeeming the mortgage.

In *Van Vronker v. Eastman*, 7 Met. 157, the question whether the plaintiff should pay the entire sum, or only in proportion to the value of her estate in dower, does not seem to have been raised. The prayer of the bill was that the plaintiff might be at liberty to redeem the estate, or contribute towards the redemption thereof. The question discussed was whether the plaintiff should also pay her proportion of the amount of an incumbrance created under the lien law, and for which the estate had been sold under the provisions of the statute. The court decided that the widow was not bound to pay any proportion of the lien, but that she should pay towards the mortgage in proportion to the value of the estate. As the mortgagee was the owner also of the equity, he may not have objected to this

course, because if she paid the whole mortgage debt she would hold the mortgage as equitable assignee, beyond her proportion, and the defendant would have to redeem again of her.

In *Gibson v. Crehore*, *supra*, the decree was for the widow to redeem by paying her proportional part; but this was upon the election of the mortgagees, the court having expressly decided that she could redeem on no other terms but by the payment of the whole debt.

There would seem to be a conflict in the doctrine of the case of *Van Vronker v. Eastman*, *supra*, with the prior case of *Gibson v. Crehore*, *supra*, and the subsequent one of *Brown v. Lapham*, *supra*, but it is reconciled by a careful view of the facts of the cases.

As the plaintiff makes no offer to redeem the whole mortgage, the bill must, in this form, be dismissed.

RIGHT OF DOWER IN MORTGAGED PREMISES: *Hitchcock v. Harrington*, 5 Am. Dec. 229, and exhaustive note thereto 232, discussing the subject; *Collins v. Torry*, Id. 273.

WIDOW HAS RIGHT TO SURPLUS ONLY OF PROCEEDS OF MORTGAGED PREMISES, where she joined in a mortgage of her husband's land for his debt, and the land was sold on foreclosure: *Hawley v. Bradford*, 37 Am. Dec. 390, and note thereto 392, on effect of wife joining in mortgage of husband's land as to dower. Wife is proper party to bill to foreclose mortgage given by the husband and wife, and to subject her dower interest to the payment of the debt, and no decree can be entered against her until she is properly brought in: *Eslava v. Lepretre*, 56 Id. 266. But widow claiming dower is estopped by foreclosure of mortgage made by her late husband from showing its invalidity, although she was not a party either to the mortgage or to its foreclosure: *Pledger v. Ellerbe*, 60 Id. 123.

WHERE PRIOR LIEN TO WIDOW'S RIGHT OF DOWER HAS BEEN PAID, SHE MUST CONTRIBUTE her ratable proportion of the amount paid before she can be endowed of the estate: See subdivision of note to *Hitchcock v. Harrington*, 5 Am. Dec. 236, treating of the effect of mortgage paid after mortgagor's death.

WIDOW CAN ONLY AVOID EFFECT OF MORTGAGE WHICH INCUMBERS HER DOWER, and be restored to her right of dower in one of two modes: 1. "When the debt shall be paid and satisfied by the husband, or by some person acting in his behalf or in his right; 2. By a redemption *pro tanto* by payment of an equitable proportion of the mortgage debt." See subdivision of note to *Hitchcock v. Harrington*, 5 Am. Dec. 237, treating of the effect of mortgage paid after mortgagor's death.

DECISIONS IN SUBSEQUENT STAGES OF SAME CAUSE decided in the principal case, viz., a bill in equity to redeem the mortgaged premises, will be found in 1 Allen, 269, *sub nom. McCabe v. Bellows*; and in 14 Id. 183, *sub nom. McCabe v. Swap*. The principal case was cited in *McCabe v. Swap*, 14 Id. 191, to the point that "when a purchaser pays off a mortgage, to which the right of dower would be subject, merely to clear the estate of the incumbrance, and not by virtue of any obligation to pay the mortgage debt, and takes an assignment, or a conveyance of his interests from the mortgagee, he

may stand on the mortgage title, if he please, and then no dower can be assigned without payment of the whole mortgage debt by the demandant;" in *Toomey v. McLean*, 105 Mass. 124, that a mortgage title will defeat the claim of dower until redemption is made; in *Lamb v. Montague*, 112 Id. 353, that an assignment of the mortgage implies the continued existence of the debt, and the equitable right to subrogation does not arise, because such right arises by operation of law only where there has been a judgment and extinguishment of the mortgage by one entitled to redeem; and in *Searle v. Chapman*, 121 Id. 21, to the point that the right of homestead is entitled to no higher degree of favor than the courts have always accorded to the common-law right of dower; and that such a case cannot be distinguished in principle from the ordinary one in which a wife, who has joined by way of releasing dower in the mortgage of her husband, is held to pay the whole mortgage debt, as a condition of asserting her right of dower against the mortgagee. *McCabe v. Bellows*, 1 Allen, 269, was also cited to this same point. *McCabe v. Swap*, 14 Id. 188, was cited in *Sargeant v. Fuller*, 105 Mass. 121, to the point that the widow cannot have dower against an outstanding mortgage title; in *Swett v. Sherman*, 109 Id. 233, that where the purposes of justice require that the payment of a mortgage debt shall be regarded as an assignment instead of an extinguishment of the mortgage, it will be held so to operate; in *Putnam v. Collamore*, 120 Id. 458, that the legal effect of a payment depends upon the relations between the parties and their relative duties; in *Tucker v. Crowley*, 127 Id. 401, to the point that when the owner of an equity of redemption purchases the mortgage on the premises, such purchase shall or shall not work a merger, as it may be for his interest; and that the strict rule of law will not be permitted to work a manifest injustice; and also to the point that where a purchaser under a warranty deed, the land being subject to a mortgage, assumes the payment of the mortgage by the deed to him, he cannot, after paying it, keep it on foot against the mortgagor by an assignment to himself; in *Thompson v. Heywood*, 129 Id. 404, that the payment of mortgages by the owner of the equity of redemption, under a deed in which he undertakes to pay the mortgages, extinguishes them, without regard to the form of the instrument by which the mortgagee may have attempted to transfer his interest to the owner of the equity; in *Locke v. Homer*, 131 Id. 102, that grantee by acceptance of deed becomes liable to perform, according to its terms, any promise or undertaking therein expressed, to be made in his behalf; in the same case, p. 108, that the grantee being not only authorized but required, by the terms of the deed which he has accepted, to pay the debt of the grantor to the mortgagee, payment by the grantee to the mortgagee of the amount of that debt would discharge that debt and the mortgage given to secure it; and in *Gaffney v. Hicks*, Id. 127, that when the grantor himself pays the mortgage debt, the mortgage is thereby discharged, and he may recover from the grantee what he has paid; when the grantee pays it, the mortgage is duly discharged; and in both cases the mortgage merges in the equity.

BURBANK v. CROOKER.

[7 GRAY, 158.]

SALE AND DELIVERY OF GOODS, ON CONDITION THAT TITLE SHALL NOT VEST IN VENDOR until payment of price, passes no title until condition is performed; and vendor, if guilty of no laches, may reclaim the property, even from one who has purchased from his vendee in good faith and without notice.

PURCHASER OF STOCK OF GOODS GENERALLY, UPON CONDITION THAT NO TITLE SHALL VEST IN HIM until payment of price, can transfer no title as against vendor until performance of condition; and vendor's delay of eight months in enforcing his rights against a second purchaser will not prejudice his case.

ORIGINAL VENDOR, AFTER NOTICE TO SECOND PURCHASER THAT HE OWNS PART OF GOODS, may maintain an action against him for a return of the goods, or their value, without more particularly designating the articles claimed by him, where the goods have been sold to the first purchaser upon condition that no title should vest in him until payment of the purchase price.

ONE TENANT IN COMMON OF PERSONAL PROPERTY HAS NO RIGHT TO SELL the entire property as his own; and if he does, he becomes liable therefor in an action of tort.

ACTION of tort for conversion of goods. Writ dated May 11, 1855. In August, 1854, plaintiff and Richardson jointly owned a small stock of goods in a country store, and agreed to sell them to a shop-keeper named Davis, at a certain price, but without fixing time of payment; and to deliver them to him to be put into his shop for sale. It was, however, agreed that the property in them should not pass to Davis until the price was paid. Davis exposed said goods for sale in the ordinary course of business, and made new purchases to keep up stock, until February, 1855, when he leased his shop and sold the stock to a party named Knights, with full notice of his agreement with plaintiff and Richardson, and without separating the goods included in that agreement from the rest. The price of those goods was never paid by Davis, and Knights agreed to pay it himself, and did pay to Richardson his proportion of it. Knights continued his general business of merchandising until April, 1855, when he sold all his stock, including some of said original goods, to defendant Crooker, who bought and paid for them in good faith, and without notice that plaintiff had any claim to them, and afterwards employed the co-defendant to sell them at auction. Plaintiff notified defendants before the auction that he owned a portion of the goods to be sold, and forbade the sale, but did not point out his particular goods. All the goods were sold; and plaintiff then demanded a return of his goods, or payment of the price thereof. Evidence of the foregoing facts was considered insufficient in the court below to entitle plaintiff to recover, and a verdict was directed for defendants, which was returned, and plaintiff excepted.

A. V. Lynde, for the plaintiff.

O. P. Judd, for the defendants.

By Court, DEWEY, J. The case shows originally a conditional sale of property to Davis by the plaintiff and Richardson, and under such circumstances as did not vest the property in Davis. This property was transferred by Davis to Knights, with knowledge on his part of the conditional sale to Davis, and subject to all the rights of plaintiff in the same. In this state of the case the property clearly remained in the plaintiff and Richardson, while held by Knights, until the condition was performed.

Had a sale been made of individual articles in the ordinary course of business in a country store, the plaintiff might have been estopped to assert any right adverse to such purchaser, having placed them in the hands of such dealer with the understanding that they were to be thus used. But the purchase by the defendant Crooker was of a different character. It was a purchase of a stock of goods generally, like any other purchase of personal property, and with only that right of property which his vendor had. The whole doctrine of conditional sales, where the possession is in the vendee, and he is apparently the owner, is one rendering purchasers less secure of acquiring a good indefeasible title; but it is well settled. 1. The purchaser in the present case from Knights takes the usual risk of the right of his vendor to sell this property: *Coggill v. Hartford & New Haven Railroad*, 3 Gray, 545; *Blanchard v. Child*, 7 Id. 155. 2. We do not perceive any such delay in enforcing his right as should prejudice the plaintiff. 3. The objection that Crooker had become the owner of the interest of Richardson, and was therefore a tenant in common, will not defeat the action; as one tenant in common has not the right to sell the entire property as his own, and if he does, becomes liable therefor in an action of tort: *Weld v. Oliver*, 21 Pick. 559. 4. No duty devolved on the plaintiff under the circumstances of the case, and the claim made by Crooker, as purchaser of the whole, to designate more particularly the articles in which the plaintiff claimed property. We think the case ought to have been submitted to the jury as to the goods sold by Knights to Crooker, under the instruction, in matters of law, already stated.

Exceptions sustained.

CONDITIONAL DELIVERY OF PROPERTY TO VENDOR IN CASE OF SALE UPON CONDITION does not vest the title in him until he performs the condition: *Mount v. Harris*, 40 Am. Dec. 89, and note thereto 91; note to *Rose v. Story*, 44 Id. 124; *Luey v. Bundy*, 32 Id. 359, and note 362, citing authority for the proposition that it is the duty of the purchaser to inquire and see that his vendor has a good title to the personalty which he undertakes to sell. In

Agnew v. Johnson, 62 Id. 303, the general rule is laid down that purchaser for value of personal property takes no better title than his vendor. But personal property delivered to vendee under conditional sale, without payment of purchase price, is liable to execution by vendee's creditors, because as to them the sale is considered fraudulent: *Rose v. Story*, 44 Id. 121. Conditional sale passes title to vendee, if there has been a reservation to vendor, of a right to repurchase the property at a fixed price and specified time: *Luckett v. Townsend*, 49 Id. 723, and exhaustive note thereto 730, on pledges.

ONE TENANT IN COMMON OF PERSONALTY MAY SUE IN ASSUMPSIT HIS CO-TENANT who has sold the common property, and received all the money: *Gardiner Mfg. Co. v. Heald*, 17 Am. Dec. 248; *Putnam v. Wise*, 37 Id. 309. So sale, conversion, or destruction of common property by one co-tenant will make him liable to an action of trover or trespass by the other co-tenant: *Hyde v. Stone*, 18 Id. 501, and note 503; S. C., 22 Id. 582, and note 585; *Rains v. McNairy*, 40 Id. 651, and collected cases in note thereto 653; *Agnew v. Johnson*, 55 Id. 565, and note to same 568.

THE PRINCIPAL CASE WAS CITED IN *Deshon v. Bigelow*, 8 Gray, 160, to the point that where cigars have been sold on condition that property in them shall not pass to purchaser until payment therefor is made in cash, where the delivery was upon the same condition, and where this condition was not waived by the seller, nor performed by the purchaser, neither an attaching creditor of the purchasers, nor their vendee, though buying of them in good faith, can hold the property against plaintiff, the original seller; in *Whitney v. Eaton*, 15 Id. 227; *Hirschorn v. Canney*, 98 Mass. 150, that in a conditional sale, where payment by note is a condition precedent, property does not pass until performance of the condition, and that vendee can convey no title as against vendor, who has not been guilty of laches, to a *bona fide* purchaser; in *Haskins v. Warren*, 115 Id. 534, that the fact that the goods were bought by a trader, or for the purpose of a resale, may have an important bearing to show that an absolute delivery is intended; in *Delaney v. Root*, 99 Id. 547, that one tenant in common of a chattel may maintain an action of trover, or tort in the nature of trover, against his co-tenant who has converted the chattel to his own use, and that such a conversion may be proved by the destruction of the chattel, by its sale, or by such an act of appropriation as will, by its nature, finally preclude the other party from any future enjoyment of it; in *Hills v. Snell*, 104 Id. 178, that when the owner has given to another, or permitted him to have control of the property, no one can be held responsible in tort for its conversion who merely makes such use of the property, or exercises such dominion over it as is warranted by the authority thus given; and in *Warner v. Abbey*, 112 Id. 360, that trover for conversion of one co-tenant's share in crops by the other can be maintained only where there is such destruction, sale, or other disposition of the crops by the one that the other party is precluded by that act from any further enjoyment of it.

PRESCOTT BANK v. CAVERLY.

[7 GRAY, 217.]

PARTY CANNOT LIMIT HIS LIABILITY AS INDORSEER BY PAROL EVIDENCE, where he signs his name on back of draft under payee's name before it is transferred to another holder, although he never had any personal interest in the draft.

LEGAL CAPACITY OF PAYEE TO INDORSE DRAFT CANNOT BE DISPUTED BY SECOND INDORSER, in an action against the latter on the bill, upon the ground of a want of legal capacity in payee to indorse, such as being a married woman.

INDORSER OF SIGHT DRAFT IS LIABLE TO HOLDER ON DEFAULT OF DRAWER, if it is presented within a reasonable time after it is received from the indorser.

PRESENTMENT IS ORDINARILY MIXED QUESTION OF LAW AND FACT, to be decided by the jury under proper instructions from the court. Especially is this so where the facts are doubtful.

PRESENTMENT IS QUESTION OF LAW, where the facts are clear and uncontradicted.

ACTION of contract against the second indorser of a bill of exchange, dated February 13, 1855, drawn by Adams & Co., in California, on themselves in Boston, and payable at sight to the order of Adeline Hall of Lowell, who was a married woman. The payee, Adeline Hall, took the bill, with her signature upon its back, to defendant's office, and requested him to collect the money. Defendant took the bill to the bank about three o'clock Saturday afternoon, March 17, 1855, after the close of their banking hours, and when the bank was open as a savings bank only. There he put his name on the back of the bill under payee's name, received the money, and paid it to Mrs. Hall, who took it away. Defendant testified that he never had any interest in the draft; that plaintiffs' teller, who received the draft and paid out the money, knew the payee and understood the facts; and that defendant knew nothing of the customs proved. The plaintiffs had proved, against defendant's objections, that the draft had been transmitted and presented for payment according to the customs and usages of the bank. The bill, indorsed in Lowell after banking hours, on Saturday, March 17, 1855, was forwarded by the holder, the bank, to Boston on the following Tuesday. It was received there during banking hours of that day, and presented for payment on the day following. The cashier of Adams & Co. at Boston had invariably paid such drafts upon presentation, until eleven o'clock on Monday, March 19, 1855, when information of the failure of Adams & Co. in California was received. The draft was dishonored; but it was proved that the draft would have been paid if it had been presented before the hour at which the failure was reported. Defendant offered to prove that, before he signed this draft, he had invariably been told, on presenting such drafts to plaintiffs, that they received such drafts as cash, and that a signer on such drafts was not to be held liable as an

indorser, but only as guaranteeing the payee's signature to be genuine, and to indicate the person to whom the money was to be paid out; and that the other banks in Lowell were accustomed to buy drafts with the same understanding. But the court rejected the evidence. Defendant asked an instruction, the effect of which was to controvert the capacity of payee to indorse the draft, and thereby pass title to him, and through him to plaintiffs, if she were found to be a married woman, with a lawful husband alive, at the time of such indorsement. But this was refused. The jury was instructed: "1. It being conceded or proved that the payee of this draft indorsed the same in blank, and that the defendant indorsed his name under the signature of Adeline Hall, the payee, without any declaration, verbal or written, restricting or limiting such indorsement, and before the same was negotiated to the plaintiffs, and that the draft was immediately afterwards negotiated to the plaintiffs, and the money taken thereon by the defendant, the defendant's liability upon such indorsement is a matter of law for the decision of the court, and the defendant is liable as indorser upon said draft; 2. The draft having been negotiated to the plaintiffs, the defendant is bound by the customs and usages of the bank as to the transmission and collection of the same, even though the defendant did not know the customs of the bank; 3. Whether the plaintiffs used due diligence in such transmission and collection of the draft in suit, when the facts are agreed, or when there is no conflict of evidence, is a question of law, and is therefore a matter for the decision of the court; 4. If the plaintiffs sent said draft to their agent at Boston in their regular and ordinary course of business in collecting similar paper, and the same was duly presented by the plaintiffs' agents in Boston, and demand duly made, and notice duly given to the defendant, the plaintiffs have used due diligence, and the defendant is responsible on said indorsement." The court directed the jury to return a verdict for plaintiffs, which was done, and defendant excepted.

B. F. Butler and R. B. Caverly, for the defendant.

D. S. Richardson, for the plaintiffs.

By Court, BIGELOW, J. We see no reason for disturbing this verdict. 1. The defendant could not control his indorsement of the draft, by parol evidence, showing that he was not to be held liable as indorser. By placing his name on the back of the draft, before it was received by the plaintiffs, he entered

into a contract with the holder, in legal effect the same as if his whole liability had been written out in full over his signature. The draft was taken by the plaintiffs in due course of business, and before its dishonor. The defendant placed his name upon it under that of the payee. This made him an indorser, with all the incidents and liabilities of that relation, and he cannot now control them by verbal testimony: *Riley v. Gerrish*, 9 Cush. 104; *Hoare v. Graham*, 3 Camp. 57; Ch. Bills, 10th Am. ed., 144.

2. Nor could he controvert the capacity of the payee to indorse the draft and pass the title to it to himself, and through him to the plaintiffs. By placing his own name as indorser on the draft, he admitted the legal ability and signature of every antecedent party: *Byles on Bills*, 6th ed., 355; *Lambert v. Pack*, 1 Salk. 127; *Crutchlow v. Parry*, 2 Camp. 182.

3. The draft being payable at sight, it was necessary to present it within a reasonable time after it was received from the indorser by the plaintiffs. They were not bound to forward it immediately, but only to use reasonable diligence in transmitting it. If guilty of no unreasonable or improper delay in its presentation, then, upon its non-payment by the drawees, they had a right to have recourse to the defendant as indorser: *Byles on Bills*, 139; *Mellish v. Rawdon*, 9 Bing. 416; S. C., 2 Moo. & S. 570; *Mullick v. Radakissen*, 9 Moo. P. C. 66; *Bridgeport Bank v. Dyer*, 19 Conn. 136.

Ordinarily, the question whether a presentment was within a reasonable time is a mixed question of law and fact, to be decided by the jury under proper instructions from the court. And it may vary very much, according to the particular circumstances of each case. If the facts are doubtful, or in dispute, it is the clear duty of the court to submit them to the jury. But when they are clear and uncontradicted, then it is competent for the court to determine whether the reasonable time required by law for the presentment has been exceeded or not: *Gilmore v. Wilbur*, 12 Pick. 124 [22 Am. Dec. 410]; *Holbrook v. Burt*, 22 Id. 555; *Spoor v. Spooner*, 12 Met. 285. In the present case, we think the ruling of the court on this point was correct; and that, on the evidence, the draft was seasonably presented for acceptance.

This view of the case renders it unnecessary to express any opinion as to the competency of the evidence of the usage of the banks in Lowell in regard to drafts like that declared on. Independently of such usage, on the undisputed facts of the case, we are of opinion that the presentment of the draft for accept-

ance was seasonable. The evidence of usage was therefore immaterial.

Exceptions overruled.

PAROL EVIDENCE AFFECTING INDORSEMENT: *Bright v. Carpenter*, 34 Am. Dec. 432; *Hall v. Newcomb*, 42 Id. 82, and note thereto 87; *Sanborn v. Southard*, 43 Id. 288; note to *Campbell v. Upshaw*, 46 Id. 76; *Patterson v. Todd*, 57 Id. 622, and note 627; *Barclay v. Weaver*, Id. 661, and note to same 667; *Lewis v. Harvey*, 59 Id. 286, and cases cited in note 292; *Baltzell v. Nosler*, 63 Id. 466.

CUSTOM AFFECTING DEMAND AND NOTICE.—Where demand and notice were not made until the day after the third day of grace, in conformity to the established practice of a bank which is the holder, such demand and notice were held sufficient to charge an indorser who had knowledge of the practice: *Bank of Columbia v. Magruder*, 14 Am. Dec. 271.

REASONABLE DEMAND AND NOTICE MUST BE MADE TO CHARGE INDORSER: *Scarborough v. Harris*, 1 Am. Dec. 609. And where the facts as to the situation of the parties, frequency of communication, etc., are admitted or found by the jury, the seasonableness of the demand and notice is a question of law: *Hadduck v. Murray*, 8 Id. 43; see also *Shed v. Brett*, 11 Id. 209, and note to same 217; *Mason v. Wash*, 12 Id. 138; *Ecfert v. Des Coudres*, 12 Id. 609; *Aymar v. Beers*, 17 Id. 538, and extended note thereto 544; *Mohawk Bank v. Broderick*, 27 Id. 192.

DUE DILIGENCE IN PRESENTMENT, ETC., OF BILLS AND OTHER NEGOTIABLE INSTRUMENTS, is a question of law, where the facts are settled or found; otherwise it is a question for the jury: *Hadduck v. Murray*, 8 Am. Dec. 43; note to *Shed v. Brett*, 11 Id. 217; *Nash v. Harrington*, 16 Id. 672; note to *Mohawk Bank v. Broderick*, 27 Id. 197; *Thompson v. Bank of South Carolina*, 30 Id. 354; and exhaustive note on the subject in *Aymar v. Beers*, 17 Id. 546.

THE PRINCIPAL CASE WAS CITED in *Clapp v. Rice*, 13 Gray, 404; *Brown v. Butler*, 99 Mass. 180, to the point that an indorser cannot prove by parol that a different contract was intended from that which the note itself and the position of the several names upon it indicates; in *Stoops v. Smith*, 100 Id. 66, to the point that the obligation of a written contract cannot be abridged or modified by, or made conditional upon, another preceding or contemporaneous parol agreement, not referred to in the writing itself; in *Bigelow v. Colton*, 13 Gray, 310, that the effect of an ordinary indorsement of a note payable to bearer cannot be varied or controlled by parol proof; and in *Kimball v. Howard Fire Ins. Co.*, 8 Id. 97, that when the facts are not in dispute, it is the province of the court to determine, as a question of law, what is reasonable diligence.

PECK v. CARPENTER.

[7 GRAY, 283.]

SOLE OCCUPATION OF ONE TENANT IN COMMON IS NOT OUSTER OF OTHER, where the latter does not choose to come in and enjoy the estate with his co-tenant, and the latter has no action at law to recover for such sole use and occupation.

TENANT IN COMMON, WHO HAS OCCUPIED AND TAKEN PROFITS OF JOINT ESTATE, IS NOT LIABLE TO HIS CO-TENANT for a surplus of the former's share, unless the former has received in money more than his share of the rents and profits of the common estate.

ACTION of contract to recover a share of the profits of a farm owned by plaintiff and defendant as tenants in common. The evidence is stated in the opinion; and was considered in the court below insufficient to maintain the action. Verdict for defendant, and plaintiff excepted.

B. Sanford, for the plaintiff.

E. H. Bennett, for the defendant.

By Court, BIGELOW, J. It does not appear that the defendant has ever received any money as the proceeds of the crops or products of the common estate. All that is proved is, that the defendant has occupied the whole estate and taken the hay and other crops growing thereon. It is perfectly well settled that when one tenant in common has the sole occupancy of the common estate, without any claim by the co-tenant to enter and occupy with him, no remedy is given by the common law in favor of the latter against the former to recover for such sole use and occupation. Each owns his estate *per mi et per tout*, and each has a right to occupy the whole if his co-tenant does not choose to come in and enjoy the estate with him. In such case, the sole occupation of one is not an ouster of the other. It is only when a tenant in common has received in money more than his share of the rents and profits of the common estate that an action at law can be sustained in this commonwealth by his co-tenant to recover the surplus: *Munroe v. Lake*, 1 Met. 464; *Shepard v. Richards*, 2 Gray, 424 [61 Am. Dec. 478], and cases there cited. There being no such evidence in this case, the plaintiff fails to maintain his action.

Exceptions overruled.

SEIZIN OF ONE TENANT IN COMMON IS SEIZIN OF ALL: *Vaughn v. Bacon*, 33 Am. Dec. 628; *Thompson v. Maushinney*, 52 Id. 176; unless there be an actual ouster: *Young v. Adams*, 58 Id. 654; notes to *Phillips v. Gregg*, 36 Id. 166; *Hart v. Gregg*, Id. 166, and note 171. Possession by tenant in common is not deemed adverse to his co-tenant: *Marcy v. Stone*, 54 Id. 736.

TO CONSTITUTE OUSTER OF ONE CO-TENANT BY ANOTHER IN POSSESSION, some notorious and unequivocal act indicating an intention to hold adversely is necessary: *Colburn v. Mason*, 43 Am. Dec. 292, and citations in note thereto, showing what constitutes an ouster of tenant in common by co-tenant. But ouster of one tenant in common by his co-tenant may be inferred from circumstances, and this is a question for the jury: *Harmon v. James*, 45 Id.

296; *Meredith v. Andres*, Id. 504, and collected cases in note thereto 506. Exclusive possession by one tenant in common, and receipt of the rents and profits of the common land for a great length of time, is not sufficient to create a legal presumption of the actual ouster of a co-tenant: *Bolton v. Hamilton*, 37 Id. 509.

JOINT TENANT CANNOT SUE HIS CO-TENANT, except he be ousted of the joint possession: *Booth v. Adams*, 34 Am. Dec. 680; *Jones v. Weatherbee*, 51 Id. 653.

ASSUMPSIT CAN BE MAINTAINED BY ONE TENANT IN COMMON AGAINST HIS CO-TENANT to recover a share of the rents and profits: See collected cases in notes to *Dickinson v. Williams*, 59 Am. Dec. 144, referring to *Freeman* on Cotenancy and Partition; *Shepard v. Richards*, 61 Id. 473, and collected cases in note to same 475, where the principal case is referred to with approval, and supported by other cases sustaining the same doctrine relative to recovery of surplus. But in *Chambers v. Chambers*, 14 Id. 585, it was held that if one cotenant receive the whole profits, the other cannot maintain an action of *assumpsit* for use and occupation, or money had and received; see note to same 586, on action by one co-tenant against another for rents and profits.

THE PRINCIPAL CASE WAS CITED in *Brown v. Wellington*, 106 Mass. 320, to the point that one who buys standing grass from a tenant in common of the land in occupation thereof, and cuts and harvests it, cannot avoid paying him the full contract price for the grass, on the ground that the co-tenant has forbidden the payment; and in *Blood v. Blood*, 110 Id. 547, to the point that one tenant in common is not bound to pay his co-tenant any compensation for the use of the common property; nor to account for the profits, unless he has received more than his just proportion, in which event he is liable to an action of contract in the nature of an implied *assumpsit*.

BARROWS v. BELL.

[7 GRAY, 301.]

WHERE FIRST PART OF ALLEGED LIBELOUS PUBLICATION IS JUSTIFIED AS TRUE AND LATTER PART IS DENIED AS APPLYING TO PLAINTIFF, the ordinary and natural meaning and construction of the language used, the declaration containing no averment of any fact which would affect the meaning of the language, no innuendo pointing any expression or allusion therein made to plaintiff, and no colloquium alleging that the language was used of and concerning plaintiff, is a question of law for the court, and it cannot be left to the jury to infer that the latter part of the publication did refer to plaintiff.

IT IS QUESTION OF CONSTRUCTION FOR COURT WHETHER ALLEGED LIBELOUS PUBLICATION purports to be a charge of fraud made by the writer upon plaintiff; or whether it is an allegation that such a charge had been made against plaintiff before a public body, such as a medical society, and of which plaintiff was a member.

PUBLICATION OF QUASI JUDICIAL PROCEEDINGS before all public bodies, for the necessary information of the people, is privileged and justifiable.

IT IS QUESTION OF FACT FOR JURY WHETHER ALLEGED LIBELOUS PUBLICATION is a true and correct narrative of quasi judicial proceedings before a public body, which may lawfully be published; and if found to be true, defendant is entitled to a verdict.

ACTION of tort for libel. A synopsis of the alleged libelous article, and of proceedings before the medical society, is given in the opinion, which also states all other facts necessary to a full understanding of the case.

C. B. Farnsworth and R. Mathewson, for the plaintiff.

T. D. Eliot and T. M. Stetson, for the defendant.

By Court, SHAW, C. J. The present is an action of tort, brought to recover damage for a publication alleged to be a libel upon the plaintiff, consisting of an article published in the Boston Medical and Surgical Journal, under the direction of the defendant.

The article alleged to be libelous is headed, "The suits against the Massachusetts Medical Society," and it proceeds to give a brief account of the proceedings of the medical society, which resulted in the expulsion of the plaintiff from his membership for misconduct. It proceeds also to state that several suits have been commenced by the plaintiff against members of the society for libel, one against the member who made the motion for his expulsion, and one against the member who seconded it. It also states that the plaintiff simultaneously initiated a process by writ of *mandamus*; that the medical society assumed the responsibility of the defense of these proceedings, and appointed a committee of three for that purpose, of whom the defendant was one. It states that these legal proceedings have all terminated favorably to the society and its members, and comes to the conclusion, "Here ends, we suppose, all further litigation;" and adds a few concluding remarks in regard to the powers of the society and the propriety of exercising them in the discharge of its duty and in vindication of its rights. The article is then followed by some remarks respecting the character and condition of the society and the medical profession, which the defendant states in his answer have no reference to the plaintiff whatever.

In his answer, the defendant admits the publication, but alleges that the part of the said publication which relates to the plaintiff is a true and correct statement of the official proceedings of the medical society, published for the information of the medical profession, and with no intent to injure the plaintiff. And he alleges that all the other portions of the said publication relate to other persons and subjects, and were not written of and concerning the plaintiff.

On the trial, as appears by the report, the plaintiff proved the

publication and the extent of the circulation of the *Boston Medical Journal*, and there rested.

The defendant then offered evidence to show the course of proceedings before the medical society, and the expulsion of the plaintiff for alleged misconduct, the fact that legal proceedings had been instituted by the plaintiff, as stated in the publication, and that they had been terminated in the manner therein stated.

The question now is in relation to the correctness of the instructions upon this evidence, which the judge who tried the cause announced and proposed to give to the jury. They are thus stated: "The judge thereupon called upon the plaintiff's counsel to state whether they expected to offer evidence to control the proof offered of the justification, or to connect the plaintiff with the last part of the publication; to which they replied that they should not offer any evidence, but should contend that the jury might infer that the latter part of the publication did refer to the plaintiff, from the article itself, and the proof already offered."

Upon this point, we think the decision of the judge was correct. The declaration contained no averment of any fact which would affect the meaning of the language, no innuendo pointing any expression or allusion therein made to the plaintiff, and no colloquium alleging that the language was used of and concerning the plaintiff. In the absence of all such averments, we think the ordinary and natural meaning and construction of the language was a question of law for the court, and therefore it was not to be left to the jury to say whether it was written of and concerning the plaintiff.

In regard to the other point, the judge proposed to instruct the jury that if they were satisfied on the evidence that the other part of the publication was true, the defendant would be entitled to a verdict.

The plaintiff's counsel contended that the publication itself was a charge by the defendant against the plaintiff of a fraudulent transaction, and the defendant, in order to justify, must on this trial prove the truth of that charge, that is, prove by evidence to be offered here that the plaintiff had been guilty of being engaged in such fraudulent transaction. But the judge ruled otherwise, and declined to leave it to the jury whether the article itself was a charge of a fraudulent transaction. This last, we think, was quite right; whether the article purported to be a charge of fraud made by the writer upon the plaintiff, or whether it was an allegation that such a charge had been made

against the plaintiff before the medical society, was a question of construction, and properly decided as a question of law.

The result, then, of this charge was that if the publication, as far as it went, was a true, just, and fair statement that such a charge of fraudulent transaction had been made to the medical society against the plaintiff, a member thereof, and determined and decided by them, and this report of the proceedings was made for the proper purpose of informing the medical profession and the public of the result of those proceedings, then it was justifiable, and not libelous. And the question now is, Was that direction right? The plaintiff insists that it was not.

The ground now taken by the learned counsel for the plaintiff, that the defense of the first part of the publication, if proved, constitutes no legal justification of the publication, is stated more broadly and in more unqualified terms than the authorities of the English common law will warrant. The general rule is, that any statement of wrongs and grievances made by a party alleging himself injured thereby, though they affect the reputation and credit of another, if made to a tribunal or body having jurisdiction of the subject-matter to inquire into the proceedings and redress the grievance complained of, if found to exist, are not libelous; and that a fair statement of these proceedings, when they have been acted upon and decided, made with an honest view of giving useful information, and where the publication will not tend to obstruct the course of justice and interfere with a fair trial, is not a libelous publication. Most of the cases relied on in the argument are these exceptional cases; as, *McGregor v. Thwaites*, 3 Barn. & Cress. 24, where the parties merely went before the magistrate for advice, and he was not called upon to act in his official capacity; and *Duncan v. Thwaites*, Id. 556, where the publication was of a mere preliminary examination, when a further hearing was ordered. Several other cases turn on the same point, and proceed on the ground that such proceedings are inchoate and *ex parte*, and ought not to be published before the trial, when the party charged has an opportunity to make his defense. The publication of the *ex parte* evidence taken before a coroner was held unjustifiable on the same ground: *Rex v. Fleet*, 1 Barn. & Ald. 383.

So in *Roberts v. Brown*, 10 Bing. 519, where it was held that the publication of the defendant was not a true and correct statement of the proceedings, and where such statement was accompanied by libelous remarks of his own, not warranted by the proceedings. But in that same case Mr. Justice Parke introduces

his opinion by this remark: "I am not prepared to say that reports of proceedings in courts of justice are not to be encouraged as instructive and beneficial to the public; but they must be accurate and fair reports; and it is by no means clear that a party is justified in publishing, without discrimination, everything that falls from the mouth of counsel."

The case of *Delegal v. Highley*, 3 Bing. N. C. 950, was an action for malicious prosecution before a magistrate, and also for libel in publishing an account of the proceedings thereon. In regard to the latter, the court held, upon a plea of justification, that it was bad and insufficient, because it did not state that the publication was a true, full, and faithful account of the proceedings in a court of justice, and therefore was not justified by the occasion.

We have stated above that we think the English rule, holding that, to justify the publication, the proceedings must be directly judicial, or had in a court of justice, is stated too broadly. In many cases it has been held that complainants made to a tribunal or officer, who is supposed to have power to inquire into and redress the grievance, if honestly made by one having an interest, though such tribunal has no jurisdiction, are not libelous; as in a petition to the king, to parliament, to a board of officers, or the like. *Fairman v. Ives*, 5 Barn. & Ald. 642, was the case of an address by the defendant to Lord Palmerston, secretary at war, against the plaintiff as an officer of the army, setting forth falsehood and dishonorable conduct in the plaintiff in not paying him an acknowledged debt. It was held that the secretary at war had no direct power to act, yet if the defendant believed that he could aid him by his influence, to obtain redress, it would rebut the charge of malice, and render the address not libelous, though otherwise it would be. The doctrine is there fully discussed, and many cases are cited other than proceedings strictly in the course of justice. See also *McDougall v. Claridge*, 1 Camp. 267, and *Fowler v. Homer*, 3 Id. 294, and the cases cited in the notes to the American edition.

But whatever may be the rule as adopted and practiced on in England, we think that a somewhat larger liberty may be claimed in this country and in this commonwealth, both for the proceedings before all public bodies, and for the publication of those proceedings for the necessary information of the people. So many municipal, parochial, and other public corporations, and so many large voluntary associations formed for almost every lawful purpose of benevolence, business, or interest, are con-

stantly holding meetings, in their nature public, and so usual is it that their proceedings are published for general use and information, that the law, to adapt itself to this necessary condition of society, must of necessity admit of these public proceedings, and a just and proper publication of them, as far as it can be done consistently with private rights. This view of the law of libel in Massachusetts is recognized, and to some extent sanctioned, by the case of *Commonwealth v. Clap*, 4 Mass. 163 [3 Am. Dec. 212], and many other cases.

A recent case in this commonwealth appears to us to be an authority in point: *Farnsworth v. Storrs*, 5 Cush. 412. It was a suit by husband and wife against a clergyman for libel, which consisted in reading a written paper before the church and congregation, being votes previously passed by the church, reciting that the female plaintiff had been dealt with by the church, found guilty, and ordered to be excommunicated for alleged unchaste conduct before her marriage with the man whom she afterwards married, being then a member of the church, and refusing to express any penitence for the crime. Upon a case stating these facts, the court decided that an action would not lie, on the ground that churches are voluntary bodies associated for lawful and useful purposes; that they are recognized and their privileges conferred by law, among which is the authority to deal with members for immoral and scandalous conduct, and punish them, on conviction, by censure, suspension, or excommunication; that to this jurisdiction every member, by entering into the church covenant submits; that these proceedings are quasi judicial, and all those who complain, act, and vote thereon, or pronounce the result, orally or in writing, in good faith, within the scope of the authority conferred, and not falsely or colorably, are protected by law.

The Massachusetts Medical Society were not a private association; they were a public corporation, chartered by one of the earliest acts under the constitution, which was amended and their powers confirmed by several subsequent acts: Stats. 1781, c. 15; 1788, c. 49; 1802, c. 123; 1818, c. 113.

The charter invested the society, their members, and licensees with large powers and privileges in regulating the important public interests of the practice of medicine and surgery, enabled them to prescribe a course of studies, to examine candidates in regard to their qualifications for practice, and give letters testimonial to those who might be found duly qualified. They were authorized to elect fellows, and vested with power

to suspend, expel, or disfranchise any fellow or member, and to make rules and by-laws for their government. No person could be a member but by his own act in accepting the appointment.

This society was regarded by these legislative acts as a public institution, by the action of which the public would be deeply affected in one of its important public interests, the health of the people. The plaintiff, by accepting his appointment as a fellow, voluntarily submitted himself to the government and jurisdiction of the society in his professional relations, so long as they acted within the scope of their authority.

The *status* or condition of being a member of this society was one of a permanent character and recognized by law—one in which each member has a valuable interest; and that it was so regarded by the plaintiff is manifest from his effort to obtain a restoration to it by a judgment of this court, by a writ of *mandamus*.

We think it obvious that the subject-matter of the complaint, dishonorable conduct, a fraudulent transaction between the plaintiff and another member of the profession and of the same society, was within the scope of the authority conferred by law on the society; and that the direction of the court, that their action was conclusive upon the plaintiff, was correct. As to the legal proceedings set forth in the supposed libel, it was admitted by the plaintiff's counsel that the account there given of those proceedings was substantially true.

If, then, this charge of dishonorable or fraudulent conduct by the plaintiff, in his dealings with Dr. Carpenter, was within the jurisdiction of the medical society, and proceedings were instituted and carried on to their final determination in the expulsion of the plaintiff from his fellowship, then the proceedings might be rightly characterized, as in the case of *Farnsworth v. Storrs*, *supra*, as *quasi* judicial; and then the only remaining question of fact was, whether the publication was a true and correct narrative of such proceedings and determination. This question the judge did leave, or proposed to leave, to the jury, with the direction that if they should find upon the evidence that that part of the publication was true, the defendant would be entitled to a verdict. We are of opinion that this direction was right. As the verdict was for the defendant, we are to assume that it was found by them; or if the verdict was taken by consent, it would have been found under the instruction that the publication did present a true and correct narrative of the proceedings before the society and their determination thereon.

The fact that these proceedings were considered closed and finished takes away from this publication the objection that it would have a tendency to prejudice the public mind and prevent the party affected from having a fair trial.

Judgment on the verdict for the defendant.

WHERE ALLEGED LIBEL CONTAINS ANYTHING THAT IS OBSCURE, or needs explanation to give it the force of written slander, the pleader should point it by innuendo or prefatory averment: *Rice v. Simmons*, 31 Am. Dec. 766. As to what complaint in action for slander or libel should contain, see note to *State v. Goodman*, 60 Id. 134.

PRIVILEGED COMMUNICATIONS, WHAT ARE: *Respublica v. Dennis*, 2 Am. Dec. 402; *Commonwealth v. Clap*, 3 Id. 212; *Stow v. Converse*, 8 Id. 189; *Bodwell v. Osgood*, 15 Id. 232, note; *Vandersee v. McGregor*, 27 Id. 156, and extended note to same on privileged communications 158; note to *Howard v. Thompson*, 34 Id. 249; *State v. Burnham*, 31 Id. 217, and collected cases in note thereto 224. The foregoing cases refer to the publication of libels respecting public officers, and communications addressed to a body, or to an individual, for the purpose of procuring some redress which that body or individual is empowered to grant. They show that the publication of the truth from good motives and for justifiable ends, though it reflects on the government or its magistrates, does not constitute a libel; but if done with an evil intent, or without probable cause, or under circumstances which will not rebut the presumption of malice, it is libelous. So also are communications made in the course of judicial proceedings privileged, if pertinent and material to the subject of controversy: Note to *Hartsock v. Reddick*, 38 Id. 143; *Gilbert v. People*, 43 Id. 646; but if the writer garbles the proceedings, or adds comments and insinuations of his own in order to asperse the character of the parties concerned, it is libelous: *Thomas v. Crowell*, 5 Id. 269; *Commonwealth v. Blanding*, 15 Id. 214.

JURY DETERMINES WHETHER LANGUAGE IS LIBELOUS OR NOT: *Van Vechten v. Hopkins*, 4 Am. Dec. 339, and note 348, where two important points in the law of libel are discussed; viz., the respective functions of the court and jury, and testimony concerning the import or effect of the libelous charge: *Usher v. Severance*, 37 Id. 33.

PLEA THAT LIBELOUS PUBLICATION IS TRUE CONSTITUTES COMPLETE DEFENSE, IF PROVED: *King v. Root*, 21 Am. Dec. 102, and cases cited in notes to same 114; and it may be proved under the general issue: *Remington v. Congdon*, 13 Id. 431.

THE PRINCIPAL CASE WAS CITED IN *Goodrich v. Hooper*, 97 Mass. 6, that in the application of rules to the facts of a new case of tort for slander, "previous decisions afford comparatively little assistance. It is always a question of the construction of the language used, which must be read and interpreted by the court as it would ordinarily be understood by mankind." *Cowley v. Pulsifer*, 137 Id. 395, was an action against the owners and publishers of the Boston Herald for a libel printed in that newspaper. The alleged libel was a report of the contents of a petition for the removal of plaintiff, an attorney at law, from the bar. The report was fair and correct, but the petition included allegations which would be actionable unless justified. In their answer defendants relied upon privilege; and the main question raised by plaintiff's exceptions was whether the publication was privileged, as ruled by the court

below. The petition had been filed in vacation, and handed back to petitioner, but it did not appear that it had ever been presented to the court or entered on the docket. This was held to constitute no justification, and that defendants did not bring themselves within the privilege admitted by plaintiff to attach to fair reports of judicial proceedings, even if preliminary or *ex parte*, and the exceptions were sustained. In the course of their opinion, the court said they would waive consideration of the tendency of a publication like that to create prejudice, and to interfere with a fair trial, and cited the principal case. "Neither," they said, "shall we discuss the question, what limitations there are, if any, to the requirement that the proceeding must have been acted on and decided," and cited the principal case. They quoted the language of Chief Justice Shaw in the principal case, viz., "that a fair statement of these proceedings, when they have been acted upon and decided, made with an honest view of giving useful information, and where the publication will not tend to obstruct the course of justice and interfere with a fair trial, is not a libelous publication." But the court said this language clearly implied that the privilege claimed by defendants did not protect them.

CHANDLER v. HOWLAND.

[7 GRAY, 348.]

RIGHTS OF RIPARIAN PROPRIETORS.—Owner of upper mill on a stream must so use the water that every riparian proprietor below shall have the enjoyment and use of it substantially according to its natural flow, subject to such interruption as is necessary and unavoidable by the reasonable and proper use of the mill privilege above.

INSTRUCTIONS RELATIVE TO RIPARIAN RIGHTS.—In action by owner of mill on stream against owner of mill above, built after the former, for disturbing flow of the water, it is not error to instruct the jury that defendant is not responsible in damages for the proper exercise of a mill privilege above; that he is responsible for the unreasonable use or unreasonable detention of the water; and that he must permit it to run to plaintiff's mill as he was accustomed to have it under the natural flow, "subject to those slight and substantially immaterial obstructions and retardations which necessarily result from exercising the right of a mill privilege above."

PLAINTIFF HAVING JOINT INTEREST IN PROPERTY amounting to one half the profits can maintain his action for an injury to it, and recover costs.

AGREEMENT BY LABORER TO RECEIVE HALF PROFITS IN LIEU OF WAGES DOES NOT NECESSARILY CONSTITUTE HIM JOINT OWNER OR PARTNER. Thus a miller employed by mill-owner to care for, tend, and run the mill, and to receive half its profits as compensation, but with no agreement as to any definite time, has no such title or possession as to require him to be joined in an action by the owner for an injury to the mill, and plaintiff can recover the whole damages in his own name.

ACTION OF TORT by owner of an ancient mill on Herring brook in Pembroke, against the owners of a more modern mill above on the same stream, for raising and keeping up a dam, thereby

retaining the water and preventing it from flowing down to plaintiff's mill. A statement of the two awards of referees mentioned by the court is immaterial. They had been rendered in cross-actions between the owners of the two mills. The nature of the instructions will appear from the opinion. Plaintiff's witness, John Butterworth, testified that during the whole time for which plaintiff claimed damages he was miller for the plaintiff; that he had charge of plaintiff's mill and tended it, and had for so doing one half the earnings thereof; that plaintiff kept the mill in running order, furnished the files, oils, and all articles necessary for keeping it in running order, and had the other half of the earnings; that Simeon B. Chandler, plaintiff's son, worked with witness, but was not hired by witness, and witness and said Simeon B. went shares in one half of the earnings of the mill, and shared alike; that witness had no concern with the running of the mill in the night-time, nor did he agree with plaintiff about running the mill at night; that plaintiff's son had help in running the mill in the night-time; that witness had no concern with it; that his agreement was never reduced to writing; that he never agreed to stay at said mill for any particular length of time, but had a right to quit at any time he pleased; that he took the mill upon shares; and that he was to have one half the earnings, and Chandler the other half. Defendants contended, upon this evidence, that the plaintiff's mill was in Butterworth's possession during the time in question, and that plaintiff had no possession sufficient to warrant the jury in returning a verdict for the plaintiff for all the damages. But the court ruled and instructed the jury otherwise. Verdict for plaintiff, with one dollar damages. Defendants excepted.

E. Wilkinson, for the defendants.

E. Ames, for the plaintiff.

By Court, *Dewey, J.* The ruling of the presiding judge, upon the trial of the present case, may, in the opinion of the court, be sustained upon general principles applicable to riparian proprietors, and without supposing any new rights to attach to the mill privilege below, as the effect of the awards of the referees.

The doctrine of the most recent case on this subject requires the owner of the upper mill to use the water in such manner that every riparian proprietor at points farther down the stream shall have the enjoyment and use of it substantially according to its natural flow, subject to such interruption as is necessary

and unavoidable by the reasonable and proper use of the mill privilege above: *Thurber v. Martin*, 2 Gray, 394 [61 Am. Dec. 468].

The case put to the jury was, that for an unreasonable use or an unreasonable detention of the water by the owner of the mill privilege above, the jury would give damages, but not for those obstructions or retardations which necessarily result from exercising the right of a mill-owner above. In the description of such obstructions, as being "slight and substantially immaterial," if those words had been used alone as the test of the question of liability, they might have been objectionable, and perhaps calculated to mislead the jury. But they were not so used, or susceptible of such construction, when taken in their proper connection. The jury were instructed that it was for the unreasonable use or unreasonable detention of the water by the defendants that damages were to be given. They were further instructed that the water was to be permitted to run to the plaintiff's mill as he was accustomed to have it under the natural flow, but subject "to those slight and substantially immaterial obstructions which necessarily result from exercising the right of a mill privilege above." The obstructions and retardations of the water, for which the defendants were not responsible, were stated to be those necessarily resulting from the proper exercise of the mill privilege above. For any damages thus occasioned they were not held responsible. This distinctly marked the character of the obstructions to which the right to a continuous flow of the water was subject, and the rule of law applicable to the case.

As to the further question raised at the trial, of the right of the plaintiff to maintain the present action, his right to recover a moiety of the damages is quite clear. Taking the case most strongly against the plaintiff, it was only a case of joint interest in the profits of the mill, the plaintiff having one half. This would enable the plaintiff to maintain the action and recover his costs.

As to the further right to recover the whole damages in his own name, the only question would be whether the plaintiff should have judgment for the sum of one dollar, or for half of that sum. This is certainly more questionable; but we think, upon the whole evidence, the plaintiff is to be taken to have been in the legal possession of the mill, and Butterworth in his employment as his miller, under an agreement that he should have one half of the earnings of the mill for tending the same.

Butterworth was miller to the plaintiff, and not lessee of the mill. There was no lease, no agreement for any particular time in which Butterworth was to be employed in the mills, or have any interest in the income of them. An agreement by which the laborer is to receive a certain share of the profits in lieu of wages does not necessarily constitute him a joint owner or partner, so as to require him to be joined as a plaintiff in a suit in reference to the property, in a share of the profits of which he is thus concerned: *Rice v. Austin*, 17 Mass. 205; *Baxter v. Rodman*, 3 Pick. 435.

Exceptions overruled.

MILL-OWNERS AND THEIR RIGHTS: *McTavish v. Carroll*, 61 Am. Dec. 353; *Blood v. Nashua & L. R. R. Corp.*, 61 Am. Dec. 444; *Thurber v. Martin*, Id. 468, and note to same 470.

NATURE AND EXTENT OF RIPARIAN PROPRIETOR'S RIGHT TO USE OF WATER: *Stein v. Burden*, 60 Am. Dec. 453, and collected cases in note thereto 458; *Thurber v. Martin*, 61 Id. 468, and collected cases in note to same 470; *Dilling v. Murray*, 63 Id. 385, and collected cases in note 389.

DOES RECEIVING CERTAIN AND DEFINITE PORTION OF PROFITS as compensation or a reward for services constitute one a partner? *Miller v. Hughes*, 10 Am. Dec. 719; *St. Victor v. Daubert*, 29 Id. 447; *Brown's Ex'r v. Higginbotham*, 27 Id. 618; *Loomis v. Marshall*, 30 Id. 596, and note 608, discussing the sharing of profits as a test of partnership; *Champion v. Bostwick*, 31 Id. 376, and references in note 382; *Bradley v. White*, 43 Id. 435.

CO-TENANTS MAY JOIN OR SEVER IN PERSONAL ACTIONS FOR INJURY TO THEIR PROPERTY: *Lathrop v. Arnold*, 43 Am. Dec. 256, and note 259; *Lahy v. Holland*, 50 Id. 708, note; *Palmer v. Dougherty*, 54 Id. 638; see Freeman on Cotenancy and Partition, secs. 329, 356-358.

TREADWELL v. SALISBURY MANUFACTURING CO.

[7 GRAY, 393.]

COURT OF CHANCERY HAS NO PECULIAR JURISDICTION OVER CORPORATIONS, to restrain them in the exercise of their powers, to control their action, or to prevent them from violating their charter, in cases where there is no fraud or breach of trust alleged as the foundation of the claim for equitable relief.

RIGHTS AND DUTIES OF CORPORATIONS ARE REGULATED BY COMMON LAW, which in most cases furnishes ample remedies for any excess or abuse of corporate powers and privileges which may injuriously affect either public or private rights.

BILL IN EQUITY CAN BE MAINTAINED AGAINST CORPORATION ONLY WHEN there is no plain and adequate remedy at law, and a case is presented which entitles a party to equitable relief, under some general head of chancery jurisdiction. This rule applies to stockholders as well as to other persons.

COURT OF CHANCERY HAS GENERAL POWER AND AUTHORITY TO ENTERTAIN JURISDICTION OF CASES IN WHICH TRUSTEES ASK FOR PROTECTION in the performance of their duties; but the cases which fall under this head of equity are those in which there are conflicting claims to the trust estate, or it is doubtful, upon the construction of the will, deed, or other instrument creating the trust, to whom the property, or the beneficial interest in it, belongs.

BILL IN EQUITY CANNOT BE MAINTAINED BY TRUSTEES WHO ARE STOCKHOLDERS IN CORPORATION, under a claim for protection and advice in the execution of their trusts, and thereby subject the corporation, and all their acts and proceedings, to the jurisdiction of a court of chancery.

RIGHT OF PLAINTIFFS TO SEEK ADVICE AND DIRECTION OF COURT IN PERFORMANCE OF THEIR DUTIES AS TRUSTEES is not dependant on defendants' acts and proceedings, whether legal or illegal. It is not necessary that defendants should be made parties, or that any decree be entered against them if they are so made.

IF PLAINTIFFS STATE CASE ENTITLING THEM TO AID AND ADVICE OF COURT IN PERFORMANCE OF THEIR DUTIES AS TRUSTEES, a suitable decree may be entered to fully meet this part of the prayer of the bill, without any inquiry concerning the legality of the acts or proceedings of a corporation defendant.

COURT OF EQUITY WILL DETERMINE ALL NECESSARY QUESTIONS OF LAW AND FACT in the exercise of its legitimate jurisdiction.

COURT OF EQUITY WILL TAKE COGNIZANCE OF COLLATERAL AND INCIDENTAL MATTERS, though they may not in themselves be the subject of a direct suit in equity, if they arise in the exercise of an acknowledged chancery jurisdiction, and the decision of the cause renders it necessary that they should be considered and determined; but they must be essential to the principal inquiry and to the relief sought by the bill, or they will be irrelevant and immaterial, and cannot be inquired into.

DETERMINATION OF IRRELEVANT AND IMMATERIAL MATTERS IN EQUITY cannot form the basis of a decree against parties who have no rights or interests involved in the principal subject-matter which forms the foundation of plaintiffs' case.

RIGHTS AND REMEDIES OF STOCKHOLDERS AGAINST CORPORATIONS ARE NOT DEPENDENT ON CAPACITY in which they own shares in the corporate stock. All stand on a perfect equality as to rights and remedies. One who holds shares as trustee is on the same plane as one who holds them in his own right.

RIGHT OF CORPORATIONS TO SELL THEIR PROPERTY IS ABSOLUTE, AT COMMON LAW, where they act by a majority of their stockholders; and this right is not limited as to objects, circumstances, or quantity.

RIGHT OF CORPORATIONS TO WIND UP AND CLOSE BUSINESS.—Corporations of a private character, established solely for trading and manufacturing purposes, have a right, by a vote of the majority of their stockholders, to wind up their affairs and close their business, where they deem it expedient to do so. Public policy does not require them to go on at a loss. But railway, canal, turnpike, charitable, religious, and other corporations established for objects *quasi* public are exceptions to the general rule.

CORPORATION MAY SELL ITS ASSETS TO NEW CORPORATION and take the stock of the latter in payment, with the assent of the majority of the stockholders of the old corporation.

STATUTE MERELY PERMITTING CHARTER OF CORPORATION TO BE DISSOLVED WITHOUT RESORT TO LEGISLATURE is not necessarily so restrictive as to take away the common-law right of a corporation to sell its property and close up its business: See acts of Mass. 1852, c. 55.

BILL in equity, by executors and trustees under the will of Thomas Cordis against the Salisbury Manufacturing Company and its directors. The bill averred that the testator bequeathed the residue of his property to his executors and the survivor of them, upon trust, to invest it in city, or state, or United States stocks, but not in individual securities, authorizing them, however, to permit any investments made by the testator "in manufacturing, insurance, or railroad, or other stocks, to remain thus invested, so long as they or a majority of them shall deem such investment safe, or for the interest of all concerned;" and that the testator had made an investment in forty shares of the Salisbury Manufacturing Company, which were now held by plaintiffs as part of such residue. The bill set forth the establishment of a new manufacturing company, called the Salisbury Mills, chartered April 14, 1856, and alleged that it was mainly, if not entirely, composed of persons who were officers or stockholders in the old company; that the directors of the old company were stockholders in the new one; and that all but one were directors in the new company. It alleged that the old company considered it advantageous to its stockholders to sell its real property and wind up its business; that a measure was passed for that purpose by a majority vote, contrary to the wishes of the minority; that the property was offered for a quarter million of dollars; that the property would bring more at a public sale; and that a provision was made that the stockholders of the old company should have a right to take shares of the new corporation in payment for their respective interests. The bill also averred that the same persons, in making said intended sale as directors of the old company, would be interested as stockholders or directors of the new company in the purchase; and submitted that such a sale by these directors, acting in a fiduciary capacity as agents and trustees of the stockholders of the old company, to themselves, acting in another fiduciary capacity, as agents and trustees of the new company, would be illegal, contrary to the rules of equity, and void. The plaintiffs were uncertain and doubtful whether they, acting as executors and trustees under said will, could invest any por-

tion of said rest and residue in the stock of the new company; or whether they could receive and hold its shares, or the proceeds of their sale, in lieu of, or in exchange for, or as a payment or dividend for said forty shares in the old company. They also averred that they could not safely subscribe for, or take, or hold, or sell shares of the new company if the intended sale was made; and invoked the aid, direction, advice, and protection of the equity side of the court for their own protection as such executors and trustees. The prayer of the bill was for an answer, not under oath; for a determination as to the validity of the votes of the company and intended sale of the property, and as to the powers of the plaintiffs, as executors and trustees, to invest in, receive, or dispose of shares in the new company; for an injunction, and for due process. The answer admitted that if an advantageous sale could have been made of the old company's property, that it would have been offered; but denied that the property could, if offered at public sale, be sold for more than a quarter million of dollars; denied that the votes of the company were illegal; and averred that it was not determined that the same persons making the sale as directors would be interested as stockholders or directors in the purchase by the new incorporation, though it was possible that they might. The answer set forth the facts of notice, and of the legality and validity of the vote. It alleged facts showing good faith toward every stockholder, and that the intended sale was for the interest of all. It also alleged that the offer to sell to the new company for a quarter million of dollars was the most discreet and expedient mode of selling proposed. It further alleged that defendants and the Salisbury Mills "were desirous of admitting every stockholder in the old incorporation to take and hold an interest in the new one to any extent he pleased, but that was to be an optional matter with him; that it had been well understood for many months by all the stockholders that the stock in the new corporation would be to a very large extent held by the old stockholders; that by means of the establishment of such new corporation additional capital would be obtained, which could be had in no other way; and that if such new corporation should be successfully organized, the existing business could be continued without interruption." The answer denied the jurisdiction of the bill; denied a surrender of the company's franchise; denied any act tending toward a dissolution; averred solvency of the old corporation; and alleged other facts showing that irreparable mischief would

be occasioned to all persons interested in the company by the granting of an injunction. Defendants then averred "that it was not their intention or purpose to hold stock as a corporation in another corporation, but to make a sale of the property for the purpose of paying the debts of the corporation, and ultimately to wind up their affairs, and to distribute the stock obtained among the individual members, if they will accept it, otherwise to reduce it to cash and distribute its value among such members; and that they, as a corporation, did not procure the charter of the new corporation, nor as a corporation do anything in relation thereto. The bill and answer were each under oath, and it was agreed that they should have the same effect as testimony of parties sworn as witnesses. Plaintiffs offered evidence tending to prove the value of the property to be more than a quarter million of dollars. Defendants offered evidence tending to prove that it would bring much less if offered for sale at auction; that the company owed a million dollars; that they had much difficulty in obtaining money; that they could not go on with their business without raising two or three hundred thousand dollars; that the company's personal property was nearly enough to pay their debts; and that the proposed arrangement was the only proper and feasible course for the company to pursue, and if the plan was not perfected the company must stop business.

R. Fletcher and J. J. Clarke, for the plaintiffs.

R. Choate, for the defendants.

By Court, BIGELOW, J. The plaintiffs, in order to maintain this bill against the defendants, and bring their case within the limits of our present chancery jurisdiction, seek to establish their right to the aid of the court in their capacity as trustees entitled to protection and advice in the execution of certain trusts with which they are clothed under the provisions of the will set out in the bill. This is the sole ground on which they rest their claim to equitable relief. It is true that the frame of the bill seems to comprehend a much broader field of jurisdiction. It sets forth certain votes and acts of the defendant corporation, which are alleged to be unlawful and beyond the scope of the powers conferred on them by their charter, and seeks to have these votes declared inoperative and void, and the defendants restrained by injunction from carrying them into effect. But the plaintiffs do not now contend that these allegations, standing alone, would make a case within the reach of the equity powers of the court.

Indeed, it is too well settled to admit of question, that a court of chancery has no peculiar jurisdiction over corporations, to restrain them in the exercise of their powers, or control their action, or prevent them from violating their charter, in cases where there is no fraud or breach of trust alleged as the foundation of the claim for equitable relief. Their rights and duties are regulated and governed by the common law, which in most cases furnishes ample remedies for any excess or abuse of corporate powers and privileges, which may injuriously affect either public or private rights. It is only when there is no plain and adequate remedy at law, and a case is presented which entitles a party to equitable relief, under some general head of chancery jurisdiction, that a bill in equity can be maintained against a corporation. And this rule is applicable to stockholders as well as to other persons: *Angell & Ames on Corp.*, sec. 312; *Grant on Corp.* 71, 271; *Morley v. Alston*, 1 Phill. Ch. 790; *Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. 371; *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. 84; *Attorney General v. Bank of Niagara*, Hopk. Ch. 354; *Hodges v. New England Screw Co.*, 1 R. I. 350 [53 Am. Dec. 624].

Looking, then, at the case presented by the bill as one in which relief is sought solely on the ground that the plaintiffs are trustees, and entitled to the advice and aid of the court in the execution of the trusts with which they are charged, the question is whether, on the facts stated and proved in the case, they show any title to a decree in equity against the defendants. There can be no doubt of the general power and authority of a court of chancery to entertain jurisdiction of cases in which trustees ask for protection in the performance of their duties. This court has often exercised such jurisdiction. But the cases which fall under this head of equity are those in which there are conflicting claims to the trust estate, or it is doubtful, upon the construction of the will, deed, or other instrument creating the trust, to whom the property or the beneficial interest in it belongs. A trustee in such cases, by filing a bill in the nature of a bill of interpleader, to which he makes parties those who have, or claim to have, an interest in the trust estate, can ask the directions of the court as to the proper mode of administering the trust, and be protected by its decree in the disposal of the property in his hands. But the allegations in the present bill present no such case. The defendants are neither the owners nor claimants of any property in the hands of the complainants. The *cestuis que trust*, those who have an interest in the

trust estate created by the will, are not even made parties to the bill. There are no adverse claimants of the trust estate or its income; nor is there any doubt or dispute concerning the interpretation of the will under which the plaintiffs hold their title as trustees. The only allegation in the bill which in any way connects the defendants with the plaintiffs is that a portion of the trust estate is invested in certain shares of the corporation.

If, then, the bill can be maintained at all against these defendants, it must rest on the single ground that trustees who are stockholders in a corporation can resort to the equity side of the court, under a claim for protection and advice in the execution of their trusts, and thereby subject the corporation and all their acts and proceedings to the jurisdiction of a court of chancery. But the objections to sustaining the bill in this aspect of the case are obvious and decisive. In the first place, it is clear that these defendants cannot be reached by any decree which the court can properly render on the case stated in the bill. The right of the plaintiffs to aid and advice from the court, in the discharge of their duties as trustees, is not in any degree dependent on the acts and proceedings of the defendants. It is not necessary, in order to enable the court to give such aid and advice, that the defendants should be made parties, or that any decree should be entered against them. A court of equity, in the exercise of its legitimate jurisdiction, will inquire into and decide upon all questions of law and fact upon which the right of a party to equitable relief depends. It will take cognizance of collateral and incidental matters, although of themselves they may not be the subject of a direct suit in equity, if they arise in the exercise of an acknowledged chancery jurisdiction, and the decision of the cause renders it necessary that they should be considered and determined. But they must be essential to the principal inquiry and to the relief sought by the bill; otherwise they are irrelevant and immaterial, and cannot be properly inquired into, much less form the basis of a decree. Assuming that the plaintiffs state a case entitling them to the aid and advice of the court in the performance of their duties as trustees, a suitable decree may be entered to meet fully this part of the prayer of the bill, without any inquiry concerning the legality of the proceedings of the corporation. Whether the acts of the defendants alleged in the bill are legal or illegal, they can in no degree affect the right of the plaintiffs to seek the advice and direction of the court in the performance of their duties as trustees. Nor can the plaintiffs make use of a bill,

the main purpose of which is alleged to be to obtain such advice and direction, to bring into adjudication collateral and irrelevant questions, and thereby procure a decree against parties who have no rights or interests involved in the principal subject-matter which forms the basis of the plaintiffs' case.

The plaintiffs seem to have proceeded on the ground that it was sufficient, in a bill framed for the purpose of obtaining protection and aid in the execution of their trust, to allege that certain acts of the defendants might injuriously affect the value of the shares in the corporation held by them in trust, in order to bring their case within the cognizance of the court and subject the corporation and its proceedings to jurisdiction in equity. But if this were so, it would follow that the rights and remedies of stockholders against corporations would be made to depend on the capacity in which they owned shares in the corporate stock. One who held them as trustee would be entitled to a remedy which would be denied to another who owned them in his own right. A corporation might be perpetually enjoined from doing certain acts, if any part of their stock, however small, happened to be held in trust, which otherwise they could do without restraint. It is clear that no such distinction between different classes of stockholders can exist. They all stand on a perfect equality as to rights and remedies. Jurisdiction in equity over a corporation must be determined, not by the capacity in which the plaintiff seeks relief, but by the case which is stated in his bill against the defendant.

Besides, if the doctrine on which this bill can alone be maintained is sound, we do not see where it is to stop. If it is true that this suit will lie against a corporation solely on the ground that their acts tend to the injury of a portion of the trust estate, and to diminish its value, we can see no reason why a like remedy might not be enforced against an individual. The result would be to sweep within the reach of equity jurisdiction almost every right or claim which a trustee might have occasion to enforce in behalf of the trust estate. By filing his bill asking the aid and advice of the court as trustee, and setting forth any acts of a defendant which tended to injure or impair the value of the trust estate, he would state a case quite as much within the reach of equitable relief as the one now before us.

Take an illustration: A trustee holds a promissory note belonging to the trust estate. He files his bill, alleging that he holds, as trustee, a note against the defendant; that when it is paid, it will be necessary for him to invest the amount accord-

ing to the provisions of the will creating the trust; that he requires the aid and advice of the court in regard to the mode and kind of investment; that the defendant is about to dispose of property in a manner which the plaintiff deems improvident and unsafe; that the defendant is engaged in transactions which are unlawful, and which tend to impair his estate, and render him unable to pay the note when it shall fall due, and that thereby the value and amount of the trust estate will be diminished. Upon a case thus stated, it would hardly be contended that an injunction could issue to restrain the defendant from disposing of his property or engaging in unlawful transactions. And yet the case does not differ essentially from that stated in the plaintiffs' bill.

Another consideration is decisive on this question of jurisdiction. If the plaintiffs can sustain their case, so that the votes and proceedings of the corporation and its directors can be declared inoperative and void, and an injunction be granted to restrain the defendants from carrying them into effect, no aid or direction will be required by the trustees in the execution of their trusts. It is only in the event that the property of the corporation is sold and exchanged for stock in the proposed new corporation, in pursuance of the votes set out in the bill, that any advice or protection is asked for by the plaintiffs. The chief object of the bill is therefore to enjoin the defendants. The aid and advice for which the plaintiffs ask is sought only as secondary to this main purpose, and as contingent upon a refusal to grant the principal relief prayed for. As a bill seeking a decree against the defendants, it cannot be maintained, for the reasons already given. As a bill in the nature of a bill of interpleader to obtain the direction of the court in the administration of a trust, it must fail, because the exigency has not yet arisen, and may not occur, to render any aid or advice necessary. A trustee cannot maintain such a bill *quia timet*, nor without joining as parties the *cestuis que trust*, who have a direct interest in the subject-matter of the bill.

There is no aspect of the case, therefore, in which the title of the plaintiffs to equitable relief can be supported. It might have been otherwise if any fraud or breach of trust had been alleged in the bill. But the case shows that the defendants, who are directors of the corporation, have acted honestly, with entire good faith, and with a single purpose to carry out the will of a majority of the stockholders.

The views which we have taken dispose of the whole case. It

is therefore unnecessary to go at large into a consideration of the other branch of the cause, which was fully and elaborately discussed at the bar. But we entertain no doubt of the right of a corporation, established solely for trading and manufacturing purposes, by a vote of the majority of their stockholders, to wind up their affairs and close their business, if in the exercise of a sound discretion they deem it expedient so to do. At common law, the right of corporations, acting by a majority of their stockholders, to sell their property is absolute, and is not limited as to objects, circumstances, or quantity: *Angell & Ames on Corp.*, secs. 127 et seq.; 2 *Kent's Com.*, 6th ed., 280; *Mayor etc. of Colchester v. Lorton*, 1 Ves. & B. 226, 240, 244; *Binney's Case*, 2 Bland, 142. To this general rule there are many exceptions, arising from the nature of particular corporations, the purposes for which they were created, and the duties and liabilities imposed on them by their charters. Corporations established for objects *quasi* public, such as railway, canal, and turnpike corporations, to which the right of eminent domain and other large privileges are granted in order to enable them to accommodate the public, may fall within the exception; as also charitable and religious bodies, in the administration of whose affairs the community, or some portion of it, has an interest to see that their corporate duties are properly discharged. Such corporations may, perhaps, be restrained from alienating their property, and compelled to appropriate it to specific uses, by *mandamus*, or other proper process. But it is not so with corporations of a private character, established solely for trading and manufacturing purposes. Neither the public nor the legislature have any direct interest in their business or its management. These are committed solely to the stockholders, who have a pecuniary stake in the proper conduct of their affairs. By accepting a charter, they do not undertake to carry on the business for which they are incorporated indefinitely, and without any regard to the condition of their corporate property. Public policy does not require them to go on at a loss. On the contrary, it would seem very clearly for the public welfare, as well as for the interest of the stockholders, that they should cease to transact business as soon as, in the exercise of a sound judgment, it is found that it cannot be prudently continued.

If this be not so, we do not see that any limit could be put to the business of a trading corporation, short of the entire loss or destruction of the corporate property. The stockholders could be compelled to carry it on until it came to actual in-

solvency; such a doctrine is without any support in reason or authority. The case of *Ward v. Society of Attorneys*, 1 Col. C. C. 370, cited by the plaintiffs, does not support it. They were not a trading corporation; nor were their affairs in an embarrassed condition. It was the case of the majority of a corporation attempting to surrender the old charter, and to pervert the corporate funds to a different purpose by passing them over to a new association. Besides, the questions raised in the case were not finally determined by the vice-chancellor. They were only considered so far as it was necessary to decide the question of granting an injunction preliminary to the hearing.

Upon the facts found in the case before us, we see no reason to doubt that the vote of the majority of the stockholders for the sale of the corporate property, and the closing of the business of the corporation, was justified by the condition of their affairs. Without available capital, and without the means of procuring it, the further prosecution of their business would be unprofitable, if not impracticable. Under these circumstances, it was in furtherance of the purposes of the corporation to pay their debts, close their affairs, and settle with their stockholders on terms most advantageous to them: *Sargent v. Webster*, 13 Met. 504.

Nor can we see anything in the proposed sale to a new corporation, and the receipt of their stock in payment, which makes the transaction illegal. It is not a sale by a trustee to himself for his own benefit; but it is a sale to another corporation for the benefit and with the consent of the *cestuis que trust*, the old stockholders. The new stock is taken in lieu of money, to be distributed among those stockholders who are willing to receive it, or to be converted into money by those who do not desire to retain it. Being done fairly and not collusively, as a mode of payment for the property of the corporation, that transaction is not open to valid objection by a minority of the stockholders: *Hodges v. New England Screw Co.*, 1 R. I. 347 [53 Am. Dec. 624].

It was urged by the plaintiffs that the common-law right of a corporation to sell their property and close their business had been taken away by the statute of 1852, c. 55. But we do not think that such is its true interpretation. It is not restrictive in its terms, but only permissive. It was intended to provide a mode in which the charter of a corporation might be dissolved without a resort to the legislature. But it did not take away the right of a corporation to proceed in the sale of their property

preparatory to a surrender of their charter, which is all that the defendants undertook to do.

Bill dismissed.

POWER OF CORPORATION TO SELL ITS PROPERTY: *The Banks v. Poitiaux*, 15 Am. Dec. 706; *Leppett v. N. J. M. & B. Co.*, 23 Id. 723, and note 740, discussing the question at length; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 37 Id. 203.

EQUITY WILL NOT GRANT RELIEF where there is a plain, speedy, and adequate remedy at law: *Andrews v. Sullivan*, 43 Am. Dec. 53; *De Witt v. Hays*, 56 Id. 352; *Doggett v. Hart*, 58 Id. 464; *Redmond v. Dickerson*, 59 Id. 418. But chancery will proceed in a case where there is an adequate remedy at law, if all the parties to the suit submit themselves without objection to the jurisdiction of the chancellor: Note to *Vann v. Hargett*, 32 Id. 694; *Bank of Utica v. Mercereau*, 49 Id. 189. The objection comes too late if made after answer on the merits and a general replication thereto: *Clark v. Flint*, 33 Id. 733, and collected cases in note to same 740. And where a court of equity has obtained jurisdiction of a subject, it will do complete justice by disposing of the whole subject at its own bar, without sending the parties to another forum: See notes to *Billups v. Sears*, 50 Id. 108; *McGowan v. Remington*, 51 Id. 589.

INVESTMENTS WHICH TRUSTEES MAY MAKE without being liable for loss. This is extensively discussed in a note to *Nyce's Estate*, 40 Am. Dec. 506.

POWER OF MAJORITY OF CORPORATORS TO ACT: *Peirce v. New Orleans Building Co.*, 29 Am. Dec. 448; note to *Downing v. Rugas*, 34 Id. 227; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 37 Id. 203; *Sargent v. Webster*, 46 Id. 743; *Commonwealth v. Cullen*, 53 Id. 450.

STOCKHOLDERS' RIGHT TO NEW STOCK: *Gray v. Portland Bank*, 3 Am. Dec. 156.

QUESTION AS TO WHO IS STOCKHOLDER IN CORPORATION is discussed in the note to *Freeland v. McCullough*, 43 Am. Dec. 697.

SUITS BY STOCKHOLDERS: See note to *Hersey v. Feazie*, 41 Am. Dec. 367; *Smith v. Hurd*, 46 Id. 690; *Hodges v. New England Screw Co.*, 53 Id. 624, and note thereto 637, on the liabilities of directors of corporations.

CITATIONS OF PRINCIPAL CASE.—That the general power to dispose of and alienate its property is also incidental to every corporation not restricted in this respect by express legislation, or by "the purposes for which it is created, and the nature of the duties and liabilities imposed by its charter:" *Com. v. Smith*, 10 Gray, 455. That a majority of the members or stockholders of religious and other strictly private corporations could, before the statutes of 1852, c. 55, re-enacted by Gen. Stats., c. 68, secs. 35-39, terminate the actual existence of such corporations by ceasing to exercise the powers and privileges conferred on them, in the same way that the existence of trading and manufacturing corporations could be ended: *In re New South Meeting-house in Boston*, 13 Allen, 513. That the question whether the corporation by its own wrongful act had made itself liable to the owner of the stock could not be tried upon a bill of interpleader, to determine to which of two parties, claiming to hold shares of stock in the plaintiff corporation, a dividend which was then due belonged: *Sohier v. Burr*, 127 Mass. 225. In *Pond v. Framingham & L. R. R.*, 130 Mass. 194, it was cited to first point in syllabus, *supra*. In *Trustees of the Smith Charities v. Inhabitants of Northampton*, 10 Gray, 503, where a bill in equity was filed by plaintiffs, seeking instructions upon cer-

tain points arising under a will, a sufficient case was stated, as there was no actual question raised and no one made a party. There was even no allegation that the question suggested was certain to arise, and the bill was founded solely on an apprehension that at some future period delays, inconveniences, and embarrassments might be occasioned by an event which had already occurred once, and might happen again at some uncertain period of time. The principal case was referred to by the court in refusing to adjudicate upon the bill. See what is said of the principal case in *Howe v. Boston Carpet Co.*, 16 Gray, 495. The principal case was also cited in *Fairbanks v. Bellnap*, 135 Mass. 182, to the point that where there are conflicting claims to a trust estate, the trustee, by filing a bill in the nature of a bill of interpleader, to which he makes parties those who claim an interest in the trust estate, can ask the direction of the court as to the proper mode of administering the trust, and can also be protected in the disposal of the property in his hands.

PARSONS v. TRASK.

[7 GRAY, 473.]

FOREIGN CONTRACT AGAINST PUBLIC POLICY OF MASSACHUSETTS WILL NOT THERE BE ENFORCED, even if it was valid where it was made. Sale of service, amounting to a form of slavery, comes within the rule; and no comity requires it to be enforced, or will suffer it to be executed.

CONTRACT FOR SERVICE MUST BE CERTAIN AND DEFINITE as to the nature and extent of service to be performed, the place where and the person to whom it is to be rendered, and the compensation to be paid, or it will not be enforced.

ACTION of tort for enticing away a servant, with a count for harboring and concealing her, with knowledge that she was the plaintiff's servant. Parsons and Elizabeth Lycka, on August 5, 1840, in Gothenburg, Sweden, entered into an agreement, founded upon a consideration of ten dollars paid by the former, for services to be performed by the latter, the nature of which, as set forth in the contract, appears in the opinion. Parsons, his executors and assigns, on their part bound themselves, during the said term of five years, to find and provide for the other party sufficient meat, drink, apparel, lodging, and washing, and at the expiration thereof to give to her the customary freedom dues. Elizabeth, as plaintiff's witness, testified that she had rendered her services in pursuance of said contract, and that it was the only one existing between her and plaintiff. And no other evidence showed that there was any other contract between them. Plaintiff offered evidence tending to prove that he had performed his part of said contract; that Elizabeth was contented with being in his service under said contract, intended to fulfill it on her part, and to remain

in his service in pursuance of its provisions for the full period; but that defendants, by various representations, which plaintiff contended were unfounded and unjust to him, induced and prevailed upon Elizabeth to withdraw and leave his service before the expiration of the five years; and that in consequence of such representations she did withdraw from and leave his service, and never returned to his house or fulfilled her contract by performing any service for him after that time, which was about two years and five months after the time when the parties left Gothenburg on their passage to the United States. The judge below ruled that this evidence would not maintain the action, and in accordance therewith the jury returned a verdict for defendants. The other facts are stated in the opinion.

S. H. Phillips and W. G. Choate, for the plaintiff.

O. P. Lord and S. B. Ives, jun., for the defendants.

By Court, THOMAS, J. The contract of service was made in Gothenburg, in Sweden. The plaintiff, at the time it was made, had his domicile in Manchester, in this county. He was then in Gothenburg, in a vessel of which he was master. Soon after the making of the contract he returned to Massachusetts, bringing Elizabeth Lycka with him. She resided as a servant in his family for about two years. This was the place of the partial performance of the contract; here the plaintiff sought to enforce it. He seeks to recover of the defendant damages for an alleged violation of his rights under it in this commonwealth.

The validity of the contract, its construction, the rights of the parties under it in this commonwealth, must be determined by our laws. Such is the view both parties have taken, and the sound one. Our tribunals may afford a remedy upon an executed contract, lawful in the place of its inception and execution, though the contract is against the policy of our laws; but they will not permit parties to execute or enforce such contract upon our soil. For example, a note given for the price of a slave in a country where slavery was tolerated might be sued in our courts; but if the purchaser brought within our jurisdiction the subject of the purchase, he could claim no rights under the contract of sale against him, because such a relation of the parties is in conflict with our fundamental law.

The first question then is, Is the contract made by the plaintiff with Elizabeth Lycka one which, under our laws, he might enforce against her?

It obviously is not a contract of apprenticeship, Elizabeth

Lycka being of full age at the time of its inception. If it were, it would be void, for, among other reasons, its omission to provide for the education of the apprentice: R. S., c. 80.

1. The contract is uncertain and indefinite as to the nature and extent of the service to be performed.

The language of the indenture is that Elizabeth Lycka "hath bound and put herself servant to the said T. Parsons, jun., to serve him, his executors and assigns, from the day of the date hereof, for and during the full term of five years thence next ensuing, during all which term the said servant her said master, his executors or assigns, faithfully shall serve, and that honestly and obediently in all things, as a good and dutiful servant ought to do." It is nowhere said that the service is to be domestic service, or that she is to be a house-servant. If any inference could be drawn from the plaintiff's position and business that he would be likely to require such service and none other, the inference would be controlled by the consideration that the service is not limited to the plaintiff or his family.

2. Not only is the contract wholly indefinite as to the nature of the service to be performed, but it is equally uncertain as to the place of performance. It cannot be limited to the place of the plaintiff's domicile; the nature of the service does not so restrict it. The service is not confined to the plaintiff; she is to serve him, or "his executors or assigns." If it be said that because the master is described as a citizen of the United States the place of performance would be within the United States, with so many states differing so widely in their local laws and domestic policy, and especially upon this subject-matter, the contract gains little certainty, either as to the nature of the service or the place of its performance.

3. Again: the contract is uncertain and indefinite as to the compensation to be paid for the labor of the servant. There is no stipulation for her passage to this country. Upon what is meant by the giving "of customary freedom dues," no light or aid is furnished us. As applied to a minor, in an indenture of apprenticeship, its meaning might possibly be ascertained by reference to an existing custom or provision of statute upon the subject. But this was a contract with an adult; and if, as the plaintiff assumes, the contract is to be performed in this commonwealth, and to be interpreted by our laws, the provision is without meaning and senseless. It looks, apparently, to a state of things which under our laws cannot exist; a term of servitude, upon the expiration of which "freedom dues" are to be paid.

As to the nature, then, of the service to be performed, the place where and the person to whom it is to be rendered, and the compensation to be paid, the contract is uncertain and indefinite—indefinite and uncertain not from any infirmity in the language of the parties, but in its substance and intent.

It is, in substance and effect, a contract for servitude, with no limitation but that of time, leaving the master to determine what the service should be, and the place where and the person to whom it should be rendered.

Such a contract, it is scarcely necessary to say, is against the policy of our institutions and laws. If such a sale of service could be lawfully made for five years, it might, from the same reasons, for ten, and so for the term of one's life. The door would thus be opened for a species of servitude inconsistent with the first and fundamental article of our declaration of rights, which, *proprio vigore*, not only abolished every vestige of slavery then existing in the commonwealth, but rendered every form of it thereafter legally impossible. That article has always been regarded, not simply as the declaration of an abstract principle, but as having the active force and conclusive authority of law.

If the contract relied upon by the plaintiff was valid where it was made, of which there is no evidence, it would lose its force when the subject of it was brought within the commonwealth. No comity would require us to enforce it, or suffer it to be executed. When the parties, master and servant, came within the jurisdiction of our laws, the contract, so far as it was inconsistent with those laws, was without effect. The master could have just the claim upon the labor of the servant, and just the power over her, which our laws permitted, and no more. He who voluntarily subjects himself to those laws finds in them the rule of restraint as well as of action.

Under this contract the plaintiff had no claim for the labor of the servant for the term of five years, or for any term whatever. She was under no legal obligation to remain in his service. There was no time during which her service was due to the plaintiff, and during which she was kept from such service by the acts of the defendants. Upon neither of the counts, therefore, can the action be sustained: *Sykes v. Dixon*, 9 Ad. & El. 693; *Boston Glass Manufactory v. Binney*, 4 Pick. 425.

Judgment on the verdict. —

VALIDITY OF CONTRACT IS TO BE DECIDED BY LAW OF PLACE where it is made; but no nation is bound to recognize or enforce any contracts which are injurious to its own interests, or to those of its own citizens, or which are

in fraud of its laws: *Smith v. Godfrey*, 61 Am. Dec. 617, and notes 622, referring to other cases.

CONTRACTS FOR SERVICES VOID AS AGAINST PUBLIC POLICY.—Policy of the law, or public policy, is a phrase of frequent occurrence; yet it seems almost as incapable of concise definition as the word "equity." Modern decisions, however, while maintaining the duty of the courts to consider the public advantage, have tended to limit the sphere within which this duty has been exercised. "It must not be forgotten," says Jessel, M. R., in *Printing etc. Co. v. Sampson*, L. R. 19 Eq. Cas. 465, "that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider that you are not lightly to interfere with this freedom of contract." Illegality vitiates contracts of every description. A distinction was formerly taken between *malum in se* and *malum prohibitum*; and some contracts which violated merely statutory provisions or general policy were subjected to less rigid rules than contracts which violated natural justice or furthered palpable iniquity. This distinction, however, is no longer recognized; and every act is now regarded as unlawful which the law forbids to be done; and every contract is declared void which contravenes any legal principle or enactment: *Aubert v. Maze*, 2 Bos. & Pnl. 374; *Cannan v. Bryce*, 3 Barn. & Ald. 183; *Greenough v. Balch*, 7 Me. 390; *White v. Buss*, 3 Cush. 450. Illegality of contract, then, may be expressed in: 1. Prohibition by statute; 2. Prohibition by express rules of the common law; 3. Prohibition through the interpretation by the courts of what is called "the policy of the law." Illegal contracts, then, may be: 1. Those in breach of statute; 2. Those in breach of express rules of the common law; 3. Agreements contrary to public policy. The last two are not always easy to distinguish, because frequent decisions upon certain matters upon public policy have caused tolerably definite and express rules regarding them to grow up; and these are in effect almost express rules of the common law. The subject of this note comes under the last division, and some questions will be noticed in it which have fallen under tolerably definite rules, making contracts of certain kinds illegal, not as breaking express rules, but as infringing upon established principles or tendencies of the law.

1. *Lobbying Contracts.*—No services are probably more contaminating to the body politic than those where secret and corrupting influences are brought to bear in shaping the course of legislation, whether it be employed to obtain the passage of private or public acts. Any attempts to deceive persons intrusted with the high functions of legislation, by secret combinations, or to create or bring into operation undue influences of any kind, have all the injurious effects of a direct fraud upon the public. Legislators should act with a single eye to the true interest of the whole people, and courts of justice can give no countenance to the use of means which may subject them to be misled by the pertinacious importunity and indirect influences of interested and unscrupulous agents or solicitors. All contracts, therefore, for services rendered in procuring, or attempting to procure, either a public or private act of a legislature by any secret and sinister means, or by any personal influence with individual members, are immoral, unlawful, and inconsistent with sound policy: See notes to *Hatsfield v. Gidden*, 32 Am. Dec. 754; notes to

Clippenger v. Hepbaugh, 40 Id. 524; notes to *Boyd v. Barclay*, 34 Id. 766; *Weed v. Black*, 2 McArthur, 268; S. C., 29 Am. Rep. 618; *Marshall v. Baltimore & O. R. R. Co.*, 16 How. 314; *Tool Co. v. Norris*, 2 Wall. 45; *Trist v. Child*, 21 Id. 441; *McBratney v. Chandler*, 22 Kan. 692; *Kansas Pacific R'y Co. v. McCoy*, 8 Id. 538; *Harris v. Simonson*, 28 Hun, 318; *Rose v. Truax*, 21 Barb. 361; *Brown v. Brown*, 34 Id. 533; *Mills v. Mills*, 40 N. Y. 543; *Frost v. Inhabitants of Belmont*, 6 Allen, 152; *Clippenger v. Hepbaugh*, 5 Watts & S. 315; S. C., 40 Am. Dec. 519; *Powers v. Skinner*, 34 Vt. 274; *Wood v. McCann*, 6 Dana, 366, holding that a contract for a contingent fee, to be paid upon the passage of a legislative act, is illegal and void, because it is a strong incentive to the exercise of personal and sinister influences to effect the object; *Usher v. McBratney*, 3 Dill. 385, also holding that a contract for services in preventing legislative investigation into the affairs of a railroad company is void; *McKee v. Cheney*, 52 How. Pr. 144; *Gil v. Williams*, 12 La. Ann. 219; *Harris v. Roof's Ex'rs*, 10 Barb. 489; and it is not necessary to adjudge that the parties stipulated for corrupt action, or that they intended that secret and improper resorts should be had. It is enough that the contract tends directly to those results: *Mills v. Mills*, 40 N. Y. 546; *McKee v. Cheney*, 52 How. Pr. 144; *Gil v. Williams*, 12 La. Ann. 219. But if the services alleged to have been performed were such as the law will sanction in aiding and promoting legislative action, they will form a valid subject of contract, and will warrant a recovery: *Harrison v. Simonson*, 28 Hun, 318. Thus there comes within this rule such services as draughting a petition which sets forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them, either orally or in writing, to a committee or other proper authority, with other services of like character intended to reach only the understanding of the persons sought to be influenced: *Trist v. Child*, 21 Wall. 441; *Sedgwick v. Stanton*, 14 N. Y. 289; *Bryan v. Reynolds*, 5 Wis. 200; *Brown v. Brown*, 34 Barb. 533. And while money is improperly used if applied directly in bribing, or indirectly in working up a personal influence upon individual members of a legislative body, "conciliating them by suppers, presents, or any of that machinery so well known to lobbyists, and which aims to secure a member's vote without reference to his judgment," yet it may be properly used to pay for the publication of circulars, or pamphlets, or otherwise, for the collection of information openly and publicly among the members of the legislature: *Kansas Pacific R'y Co. v. McCoy*, 8 Kan. 538.

2. *Services in Procuring Contracts from Heads of Departments.*—There is no real difference in principle between agreements to procure favors from legislative bodies and agreements to procure favors in the shape of contracts from the heads of departments. The introduction of improper elements to control the action of both is the direct and inevitable result of all such arrangements. So where one enters into a contract, for compensation, to procure a contract from the government to furnish its supplies, it is against public policy, and cannot be enforced: *Tool Co. v. Norris*, 2 Wall. 45. This case was distinguished, however, in *Wispenny v. French*, 18 Ohio St. 475, where it was said that the former case was very properly classed with agreements for lobbying legislative bodies, for procuring appointments to office, and the like; because it was simply an agreement to pay a party for personal solicitations and personal influences to be used in controlling the discretion of public officers. But the latter case was essentially different from the former, said the court. Here there was a simple authorization to make a contract, a specified and well-defined contract. No contingent fee. No special

agreement as to mode or amount of compensation. Winpenny merely employed an agent to put in his bid at a public letting, and authorized him to guarantee performance. French was not employed to "procure" a contract as a mere matter of personal favor, but to make the contract as a matter of convenience and necessity. There was, it was said, nothing in the nature of such an employment to require or suggest the use of improper influences, and French seemed to have acted openly, honestly, and at arm's-length with the officer, resorting to no devices to prevent a free competition by others. The court did not adjudicate upon the point, but observed that, in their judgment, "no case of illegal consideration is shown by the evidence. We know of no law forbidding the employment of agents to negotiate contracts with the government. It is an employment which is, in many cases, peculiarly liable to abuse, and which, therefore, should be narrowly watched, but it is not necessarily illegal or against public policy. If fairly and honestly concluded, it is in harmony with the public interest, and of benefit to both contracting parties. In many cases such agents are indispensable to the contractor, on account of his absence or incompetency to transact the business. In such cases they are of benefit to the government also, by increasing the number of competitors for its contracts, and by enabling its officials to dispatch public business without unnecessary delay and trouble." On agreements not to bid, and to withdraw bid, see *Swan v. Chorpenny*, 20 Cal. 182.

3. *Lawyers' Professional Services.*—The cases mentioned in the first subdivision, *supra*, clearly show that an attorney cannot recover fees for his services as a "lobbyist" in the sense in which that term is now used, as such contracts are against public policy, and void. He may, however, recover compensation on contracts made in consideration of particular service to be rendered, such as the collection of evidence, the preparation of papers, or the delivery of arguments in support of a claim, for these are legitimate everywhere: *Trist v. Child*, 21 Wall. 441; *Weed v. Black*, 2 McArthur, 268; S. C., 29 Am. Rep. 618; *Brown v. Brown*, 34 Barb. 533; and the contract is valid, whether the services are to be rendered before a court, a department of the government; or a legislative body: *McBratney v. Chandler*, 22 Kan. 692. While contracts for a contingent compensation to use personal influence on legislators are void by the policy of the law, as shown in the cases cited in the first subdivision above, yet an attorney's contract for a contingent fee for his services in collecting a claim against the United States, which is otherwise fair upon its face, is not in violation of public policy: *Burbridge v. Fackler*, 2 McArthur, 407. But while compensation can be recovered for legitimate professional services when the contract stands alone, yet if it is blended and confused with a contract which is forbidden, the whole is a unit, and indivisible, and that which is bad destroys the good, and compensation can be recovered for no part. His services cannot be partially those of an attorney and partially those of a lobbyist. If these are blended together as part and parcel of a single employment, the entire contract is vitiated, and after performance no recovery can be had for the work done as an attorney: *Trist v. Child*, 21 Wall. 441; *McBratney v. Chandler*, 22 Kan. 692; *Brown v. Brown*, 34 Barb. 534. An agreement with an attorney, in which he stipulates to do all in his power to prevent the passage of a certain act of congress confirming a Spanish land grant, and to endeavor to secure the passage of another act recognizing the title of other claimants, has been held not void on the ground of public policy: *Hunt v. Test*, 8 Ala. 713; S. C., 42 Am. Dec. 659; and so of an agreement with an attorney at law to do what can legally be done to obtain from

the governor a pardon or commutation of sentence of a person convicted of crime; for it will be assumed that his employment to do what he can to obtain a pardon, etc., contemplates only such legal and proper acts as the law allows him to agree to perform: *Bremser v. Engler*, 49 N. Y. Super. Ct. 172. In *Price v. Caperton*, 1 Duv. 207, it was held that a contract for a contingent fee, dependent upon conviction, ought not to be enforced; and in the same case it was held that the employment of counsel to assist the official attorney in a criminal prosecution is not inconsistent with public policy, and that the law will enforce a promise by the employer, whether express or implied, to pay such counsel reasonable compensation. A contract, however, that one shall lend his aid in securing the appointment of special counsel to defend in a case in procuring testimony against the government of the United States, and in giving information for the management of it, on consideration that the appointed attorney shall pay him one half of all the fees he shall receive in such case, is contrary to public policy, and void: *Meguire v. Corvine*, 101 U. S. 108; S. C., 3 McArthur, 81. A prosecuting attorney cannot delegate his powers, but may, perhaps, employ assistants in ways not involving his official discretion or responsibility. This discretion can only be delegated on special grounds, where an assistant has been provided by law. Any other delegation of his powers is against public policy, and illegal; and no compensation for services rendered can be recovered by the one to whom such an unlawful delegation is made: *Engle v. Chipman*, 51 Mich. 524. An agreement by an attorney at law to procure, for a contingent fee, the quashing of a criminal prosecution, is also contrary to sound public policy, and void: *Ormerod v. Dearman*, 100 Pa. St. 561; S. C., 45 Am. Rep. 391.

4. *Contracts to Secure Appointment to Office or Places of Trust.*—Contracts for services rendered in securing such appointments fall within the same rule as services rendered in lobbying, and is equally obnoxious to the principles of a government "founded theoretically on the most pure and exalted public virtue." All agreements by which one person engages to pay another for his services, aid, or influence in procuring an appointment to office are contrary to public policy, and void. "Public offices are trusts held solely for the public good, and should be conferred from considerations of the ability, integrity, fidelity, and fitness for the position of the appointee. No other considerations can properly be regarded by the appointing power. Whatever introduces other elements to control this power must necessarily lower the character of the appointments to the great detriment of the public. Agreements for compensation to procure these appointments tend directly and necessarily to introduce such elements. The law, therefore, from this tendency alone, adjudges these agreements inconsistent with sound morals and public policy:" *Tool Co. v. Norris*, 2 Wall. 55; *Gray v. Hook*, 4 N. Y. 449; *Filson v. Hines*, 5 Pa. St. 452; S. C., 47 Am. Dec. 422; *Hager v. Callin*, 18 Hun, 448. It makes no difference how false the representations of the promisor to the promisee may be, or how much the latter may be injured thereby, he cannot recover for the injury, or even give such representations in evidence: *Haas & Co. v. Penlon*, 8 Kan. 601. A promise made in consideration of the appointing power being prevailed upon by the promisee to appoint the promisor to an office is contrary to public policy, and void: *Faurie v. Morin*, 4 Mart. 39; S. C., 6 Am. Dec. 701; so where two are applicants for the same appointment, an agreement that one will withdraw on consideration that the other will divide the receipts and emoluments with him if appointed is also void, for the same reason: *Gray v. Hook*, 4 N. Y. 449; and an agreement after the appoint-

ment on the same terms is void, as being in pursuance of the original contract: *Hunter v. Nolf*, 71 Pa. St. 282; see *Stout v. Ennis*, 28 Kan. 706. No recovery can be had for services rendered by one in recommending another as a responsible and reliable builder on consideration that the latter shall pay the former a sum of money "for his trouble:" *Holcomb v. Weaver*, 136 Mass. 285. A contract to buy of a director and president of a national bank shares of its stock, on condition that the purchaser shall be made cashier of the bank, is against public policy, and void: *Noel v. Drake*, 28 Kan. 265; S. C., 42 Am. Rep. 162. See services in influencing elections, *infra*, and on this subdivision generally, *Parsons v. Thompson*, 1 H. Black. 322; *Harrington v. Du Chatel*, 1 Bro. C. C. 124; *Morris v. McCulloch*, Ambl. 435; *Eddy v. Capron*, 4 R. L. 394; *Pingry v. Washburn*, 1 Aik. 264; *Gulick v. Bailey*, 10 N. J. L. 87.

5. *Services in Improperly Influencing Elections* are also demoralizing and destructive in their tendency, and are not valid subjects of contract. The purity of the ballot-box will be sedulously guarded by the courts, and the corrupt practices of candidates for office will be frowned down. So a person who, on election day or immediately prior thereto, furnished liquor, at a candidate's request, or that of any other person, for the purpose of influencing electors, cannot recover, as such contract violates the policy of the law concerning purity of elections: *Duke v. Asbee*, 11 Ired. L. 112; and an agreement between a candidate and another person, prior to an election, to share the salary, fees, and emoluments of an office, in consideration of money advanced by the latter to the former to secure his election, and of the latter's services and use of personal influence to elect the former, is in violation of the policy of election laws, and void: *Martin v. Wade*, 37 Cal. 168; *Gaston v. Drake*, 14 Nev. 175; S. C., 33 Am. Rep. 548. If for money or any other personal profit a voter agrees to render his services or exert his influence in an election against what he believes to be for the public good, the contract is void, though he, in the exercise of his personal interest, resorts to no unlawful means: *Nichols v. Mudgett*, 32 Vt. 546. But a candidate for a national office, who cannot personally present his views of national policy over a wide area of constituency, commits no offense in employing and compensating a person for that purpose; and one rendering such political services may recover therefor, if there is no statutory law in his way: *Murphy v. English*, 64 How. Pr. 362. A contract whereby a candidate for tax assessor agrees, if successful, to appoint another person his chief deputy, and pay him from the fees and perquisites of the office twenty-five hundred dollars annually, on consideration that the latter will make the former's official bond for him, and perform all the duties of the office except such as related to the assessment of poll-tax, is contrary to sound policy, and void: *Robertson v. Robinson*, 65 Ala. 610; S. C., 39 Am. Rep. 17. One's contract to render services in securing the nomination and election of a candidate to office, for and in consideration of his being appointed deputy during such officer's term, is an agreement against public policy, and void; but an agreement made after election that the officer will appoint one a deputy for the official term, and pay him for his services one half of the net salary and fees of the office, is not necessarily illegal or void, if the two contracts can be shown to have no necessary connection with each other, and that the second is not founded upon the first: *Stout v. Ennis*, 28 Kan. 706; see *Hunter v. Nolf*, 71 Pa. St. 282. A note given in consideration that the payee will give the maker his interest in an ensuing election is void: *Swayze v. Hull*, 8 N. J. L. 54; S. C., 14 Am. Dec. 399.

6. *Agreements to Influence Action of Officers*.—The law requires every officer to do his duty, and his contract with another to render only such ser-

vices as the law requires of him is against the policy of the law, and void: *Kick v. Merry*, 23 Mo. 72, *post*, p. 658; *Mitchell v. Vance*, 5 T. B. Mon. 528; S. C., 17 Am. Dec. 96; but a prisoner's contract to pay his jailer for extraordinary services and attention in his sickness, and which the law does not make it the duty of the jailer to perform, is binding, and not against public policy: *Trundle's Adm'r v. Riley*, 17 B. Mon. 396. Contract to pay certain persons a sum of money provided they will petition the common council of a city for the improvement of a street is not in accord with sound public policy, and is therefore void: *Maguire v. Smock*, 1 Wila. 92. This is on the ground that "the owners of real estate on our streets would be at the mercy of combinations, or of greedy contractors who might choose to donate a portion of their anticipated profits to the procuring of signatures to petitions in favor of street improvements. All reliance in petitions, as expressions of the honest wishes of the petitioners, would at once be destroyed, and distrust and suspicion take the place of that confidence and good faith which should exist in all such proceedings." *Id.* 97. The payment of money by one having claims against a corporation to another, on condition that the latter will use his personal influence with the street commissioners to induce a favorable settlement and allowance of such claims, where it cannot be obtained without such influence, is unlawful, and all contracts for such a purpose are contrary to public policy, and void: *Devlin v. Brady*, 32 Barb. 518. Contracts whereby one undertakes to pay another money provided the latter will use his actual or supposed influence with military authorities to induce them to allow the former certain privileges to which he is lawfully entitled come within the same rule: *Hutchen v. Gibson*, 1 Bush, 270. Contracts obtained from the government by the use of personal influence stand on the same footing as between the persons who have agreed between themselves to procure them: *Oscanyan v. Arms Co.*, 103 U. S. 261. Services in person by an application to the war department for the discharge of a drafted man, and for which, if successful, a contingent compensation is to be paid, are contrary to sound policy, and no recovery will be allowed therefor: *Bowman v. Coffroth*, 59 Pa. St. 19. No recovery can be had by a person who renders services in assisting to make an unlawful arrest, and preventing a rescue, although he has been indemnified by a justice of the peace, who previously informed him that such arrest would be lawful: *Oumpston v. Lambert*, 18 Ohio, 81. That law will not assist a person who intentionally aids another in illegal act, see *Spurgeon v. McElwain*, 6 Id. 442; S. C., 27 Am. Dec. 266. An agreement to indemnify an officer against the voluntary escape of a prisoner is void as against public policy: *Ayer v. Hutchins*, 4 Mass. 370; S. C., 3 Am. Dec. 232. And a promise to indemnify a sheriff for releasing a defendant from arrest is contrary to public policy, and void. The officer must obey his writ, and can take no indemnity for refusing to obey it, although the person making the promise falsely informs him that the process has been satisfied: *Webbers' Ex'rs v. Blunt*, 19 Wend. 188; S. C., 32 Am. Dec. 445.

7. *Procuring Pardons and Commutation of Sentences.*—This subdivision is closely identified with the foregoing one, because to secure a pardon or commutation of sentence an influence, either personal or otherwise, is generally brought to bear upon the executive head of the government, who exercises this matter of grace. A contract to pay for services in attempting to procure the pardon of a convict is unlawful and void if unwarrantable means have been used to procure it; such as the use of money given to a person of good connections, and having access to persons of influence, for using his interest by representing in favorable terms the case and character of a convict who is

under sentence of imprisonment or death: *Norman v. Cole*, 3 Esp. 253; *Chadwick v. Knox*, 31 N. H. 226; *Hatzfeld v. Gulden*, 7 Watts, 152; S. C., 32 Am. Dec. 750; *Willey v. Collier*, 7 Md. 279. Where a person interposes his interest and good offices to procure a pardon, it ought to be done gratuitously, and not for money; the doing of an act of that description should proceed from pure motives, not from pecuniary ones. The reasons why agreements to obtain executive clemency by means of pardons or writs of *nolle prosequi* are not enforced is, that "they are designed to protect the exercise of this power from abuse through the intervention of designing persons; and although in the particular instance no improper motives may have been resorted to, the public interest in such questions requires that the principle should be enforced in all cases. It may sometimes, as between the parties, be unjust to a claimant who has rendered valuable services for another in his distress; but rules of law, founded on public policy and the safety of society, will not be set aside to sustain an individual demand." See case last cited, p. 279. A contract to pay for services in procuring signatures to a petition to the governor, or to military authorities, for a pardon or a commutation of sentence, is also contrary to the policy of the law, and void: *Hatzfeld v. Gulden*, 7 Watts, 152; S. C., 32 Am. Dec. 750; *Haines v. Lewis*, 54 Iowa, 301; S. C., 37 Am. Rep. 202; *Thompson v. Wharton*, 7 Bush, 563; S. C., 3 Am. Rep. 306; *Kribben v. Haycraft*, 26 Mo. 396; and a contract to pay a person for his services in managing a petition to the governor for the remission of a forfeiture, and procuring such remission, falls within the same class, and for the same reasons: *McGill's Adm'r v. Burnett*, 7 J. J. Marsh. 640. But while a contract for services rendered in procuring a pardon by the use of money, directly or indirectly, will be void, yet an agreement to procure a pardon from the governor for a convict by the proper use of all legitimate means is neither immoral nor against the public policy: *Formby v. Pryor*, 15 Ga. 258; and it is now held in this country that a promise to pay for services and expenses, without contemplating or resorting to any illegal or improper measures, in procuring a pardon for a convict, is not illegal or invalid. Even the released prisoner's promise, voluntarily made, to pay for such services, will be binding, if they were unobjectionable, though they were originally rendered in part or wholly from kindness: *Chadwick v. Knox*, 31 N. H. 226; S. C., 64 Am. Dec. 329. There is no objection, in applying to the legislature for a pardon, in using before that body an authenticated copy of the evidence taken down on the trial of the convict: *Bird v. Breedlove*, 24 Ga. 623; *Bird v. Meadows*, 25 Id. 251. An attorney may do what can legally be done in procuring a pardon; and it will certainly not embarrass the operations of the governor to have a proper statement of the facts of the case prepared, affidavits prepared and verified, and the circumstances properly presented to him to show that the prisoner is a proper subject for executive clemency: *Bremsen v. Engler*, 49 N. Y. Super. Ct. 172. But the business of attending to applications for pardon is not restricted to attorneys at law: *Bird v. Breedlove*, 24 Ga. 623. "It is not," says Bell, J., in *Chadwick v. Knox*, 31 N. H. 224, S. C., 64 Am. Dec. 329, "at once apparent that it is not lawful and proper for a party who is suffering the punishment of crime to apply to the pardoning power for a remission of his sentence; and, so far as we are aware, no censure can be regarded as attaching to such an application, either in law or morals. It seems to us equally reasonable for any other person, who believes it his duty to make such application in behalf of another, to present the case to the executive, with such petitions, memorials, statements of facts, and evidence as are suitable to satisfy the pardoning power of the propriety of the relief desired,

and we think no censure can be justly attached to any person for his exertions in such a case, if the measures adopted are consistent with the facts of the case, and with the truth and honesty of all parties concerned; while any effort to obtain such pardon by falsehood and misrepresentation, or by any species of fraudulent contrivance, or by prostituting the influence resulting from official station, or from personal relation to the pardoning power, is entirely forbidden by law."

8. *Miscellaneous Contracts for Services.*—Contract to reprint any literary work in violation of copyright secured to third person is void, and the printer who executes such contract, knowing the rights of such third person, cannot recover for his services: *Nichols v. Ruggles*, 3 Am. Dec. 262. Person contracting with a vestry whom he knows to have been illegally elected cannot recover for his services during the time he may serve with knowledge of such illegal title to office, though in absence of such knowledge he may recover: *St. Luke's Church v. Mathews*, 6 Id. 619. As to conspiracies to control wages or workmen, see extensive note on this subject to *People v. Fisher*, 28 Id. 507. On champerty and maintenance, see exhaustive note to *Thallheimer v. Brinckerhoff*, 15 Id. 316. On prohibited contracts, see note to *Gulick v. Ward*, 18 Id. 403; *Columbia Bank v. Haldeman*, 42 Id. 229, and note to same 230, containing collected cases; *Ohio L. I. & T. Co. v. Merchants' etc. Co.*, 53 Id. 742, and citations 770; *Persons v. Jones*, 58 Id. 476. A marriage brokerage contract is void, as being against public policy, and no recovery can be had for services under it: *Crawford v. Russell*, 62 Barb. 92. But a contract to pay one a consideration to induce him to act as administrator upon the estates of the obligor's father and mother is not contrary to public policy, and may be enforced: *Clark v. Constantine*, 3 Bush, 652. Offer of reward to arrest and convict a criminal is not a contract without consideration, and any service rendered under or at the request of such offer will support an action, unless the party claiming the reward for such apprehension has colluded with the criminal in order to divide the reward. "The policy of offering rewards, whether by the government or by individuals, for the arrest of criminal offenders is to stimulate the citizen in the discharge of a public duty; and the consideration of the reward is the supposed danger, expense, or trouble necessary to be incurred in the performance of that duty:" *Furman v. Parke*, 21 N. J. L. 310; *Bledsoe v. Jackson*, 36 Tenn. 429. But an agreement to procure witnesses to testify to a certain state of facts is not only immoral, but against public policy, and therefore void, and no recovery can be had for services under such a contract: *Patterson v. Donner*, 48 Cal. 369, 380. An agreement to stifle criminal prosecutions is also in the same class: *Rhodes v. Neal*, 64 Ga. 704; S. C., 37 Am. Rep. 93; *Barron v. Tucker*, 53 Vt. 338; S. C., 38 Am. Rep. 684; *Ormerod v. Dearman*, 100 Pa. St. 561; S. C., 45 Am. Rep. 391; *Lindsay v. Smith*, 78 N. C. 328. It is not against public policy for the owner of a building to employ one of the contractors as superintendent: *Shaw v. Andrews*, 9 Cal. 73. A contract to prevent the performance of a duty imposed by law, and in the performance of which the state has an interest, is in contravention of public policy, and therefore void: *James v. Hendree's Adm'r*, 34 Ala. 488; but see *Müller v. Roberts*, 18 Tex. 16. Contract by which one person binds himself to settle on vacant lands and procure title thereto, and convey it to another, is against the policy of the law granting lands to settlers, and specific performance thereof will not be enforced in equity: *McDermid v. McCasland*, Hard. 21. No recovery can be had for services rendered in selling tickets in a foreign lottery: *Rolfe v. Delmar*, 7 Robt. 80. But an aged person's contract, by which he binds him-

self to dispose of his estate by will in a certain way, in consideration of certain provisions for his support for life, is not contrary to any rule of policy: *Logan v. McGinnis*, 12 Pa. St. 27; neither is a contract for the sale and purchase of gold: *Brown v. Speyers*, 20 Gratt. 296; *Appleman v. Fisher*, 34 Md. 540. Agreement to become bail in order that prisoner may be released from custody so as to escape is void, as obstructing or interfering with the administration of public justice: *Dunkin v. Hodge*, 46 Ala. 523. *Ex turpi causa non oritur actio*: *Skeels v. Phillips*, 54 Ill. 309. Contract to clear a citizen from draft is against public policy, and void: *O'Hara v. Carpenter*, 23 Mich. 410; *Turner v. Smithers*, 3 Houst. 430; so is one which grows out of an illegal or immoral act: *Neustadt v. Hall*, 58 Ill. 172. A county surveyor's contract to receive an application to purchase land, make the survey, and perform other official acts for the joint benefit of himself and another, is void, because contrary to sound policy: *Edwards v. Estell*, 48 Cal. 194. But that the agent of a county may recover for his services in making application to the general government for its swamp-lands, see *Denison v. Crawford Co.*, 48 Iowa, 211. A man's contract to sell his reputation and skill in any profession to another person is void, as against public policy: *Jerome v. Bigelow*, 66 Ill. 452. An illegal contract avoids agreements made in furtherance of it: *Id.*; *Robinson v. Kalbfleisch*, 5 N. Y. 212. Contract to convey land on consideration that the grantee shall render services as a substitute in war is against public policy, and cannot be enforced: *Lance v. Hunter*, 72 N. C. 178. Secret partnership made by two persons, that they are to be equally interested in contract for work obtained by one of them, comes within the same rule: *Kelly v. Devlin*, 58 How. Pr. 487. An agreement to give to an officer of a corporation anything of value, or to render certain services free of charge, in consideration for his assent to the execution of a particular contract, is highly immoral, contrary to public policy, and void: *Western Union Tel. Co. v. Union P. R. R. Co.*, 1 McCrary, 418; so is the contract between a corporation and its president or one of its directors: *Munson v. Syracuse, G. & C. R. Co.*, 29 Hun, 76; so is the secret contract of one employed by another to use his personal influence and services in assisting a third person to make sales to such employer: *Atlee v. Fink*, 75 Mo. 100; S. C., 42 Am. Rep. 385. The same is true of an agreement to oust a court of its jurisdiction: *White v. Middlesex R. R.*, 135 Mass. 216. As to contracts regarding the location of depots, etc., see note to *Gulick v. Ward*, 18 Am. Dec. 403; and *First National Bank etc. v. Hendrie*, 49 Iowa, 402; S. C., 31 Am. Rep. 153; see also *Pueblo & Ark. V. R. R. Co. v. Taylor*, 6 Col. 1; S. C., 45 Am. Rep. 512; *Texas & St. L. R. R. Co. v. Robards*, 60 Tex. 545; S. C., 48 Am. Rep. 268, where other forms of contracts void as against public policy will be seen. A contract to pay an officer a greater compensation for services required by law than that fixed by statute is absolutely void, as contravening sound public policy: *Fawcett v. Eberly*, 58 Iowa, 544. The test whether a demand connected with an illegal transaction is capable of being enforced at law is whether the plaintiff requires the aid of the illegal transaction to establish his case: *Scott v. Duffy*, 14 Pa. St. 20, and cases there cited.

HERVEY v. MOSELEY.

[7 GRAY, 479.]

LAW OF MARRIAGE PERMITTING FEMALE CHILD TO MARRY AFTER AGE OF TWELVE entirely overrides right of parent to services of child, or duties from one to the other as servant and master.

LEGAL MARRIAGE OF FEMALE CHILD AFTER ATTAINING STATUTORY AGE OF LAWFUL WEDLOCK discharges her from all further duties to perform service for her parents, as she has assumed new relations inconsistent therewith.

ORDINARY CONTRACTS PROHIBITED BY PENAL STATUTE are illegal and invalid, but marriage is an exception.

MARRIAGE CONTRACT OF FEMALE IS VALID AFTER SHE REACHES STATUTORY AGE OF LAWFUL WEDLOCK, twelve years, notwithstanding the penalty incurred by those uniting her in marriage while she is under the age of eighteen, and the fact that it was made without the consent of her parent or guardian.

PARENT HAS NO ACTION.—FALSE AND FRAUDULENT REPRESENTATIONS TO OFFICERS, AND THOSE AUTHORIZED TO SOLEMNIZE MARRIAGES, and which culminate in a clandestine marriage, form no cause of action for loss of daughter's services after she has attained the statutory age of lawful wedlock, twelve years, and before she has reached that age under which the statute prohibits her from marrying without the consent of her parent or guardian. It is a criminal offense.

DEFENDANT HAVING DENIED EACH AVERMENT IN DECLARATION MAY OBJECT TO MAINTENANCE OF ACTION without having filed a demurrer under the practice act, which requires his answer to contain a statement that he demurs, if he wishes to raise an issue of law: See Acts of Mass. 1852, c. 313, secs. 17, 21.

ACTION of tort. It was averred in the declaration "that the defendant unlawfully enticed and procured the plaintiff's daughter, an infant under the age of fourteen years, to depart from and leave the plaintiff's service, and by false and fraudulent means, without the knowledge or consent of the plaintiff, procured her said daughter to be married to a person of bad character and dissolute habits; by means whereof the plaintiff ever since hath been, now is, and ever may be deprived of the services, society, and benefit of her said daughter." Every averment in the declaration was denied in detail by the answer. Plaintiff was a widow, and her thirteen-year-old daughter, while in her charge and control, was married without her consent to T. J. Parton. It was admitted that this marriage had been held valid by this court. Plaintiff offered evidence that defendant fraudulently procured the marriage certificate from the city clerk of Lynn, by falsely representing to him that the said daughter was eighteen years of age; and also that he practiced deception in reference to such marriage upon the magistrate who solemnized

it, in order to induce him to solemnize it, when otherwise he would not have done it. Defendant objected that evidence of fraud or imposition on defendant's part was not competent unless practiced personally upon the daughter, and not upon a third person. Objection overruled and evidence admitted. No evidence of actual service was shown. Defendant put in no demurrer, made no issue of law in his answer, as required by the practice act of 1852, but raised only certain issues of fact, and went to trial on them. Verdict for plaintiff, and defendant excepted.

W. D. Northend, for the defendant.

S. B. Ives, jun., for the plaintiff.

By Court, *DEWEY, J.* This action is certainly one of novel impression. The principles relied upon in support of it are not applicable to the case, or are themselves unsound. While it may be true, abstractly, that for every wrong there is a remedy, yet we well know that there are many social wrongs, deeply affecting the interest and happiness of the domestic circle, for which no legal redress or pecuniary damages can be demanded in a court of justice by those injured. The present case may be one of them. The laws of the land might have forbidden all marriages by females under the age of twenty-one years, and declared all such marriages absolutely void. The state of the female under twenty-one years of age might have been declared unqualifiedly a state of servitude to the parents, which nothing that she could do could dissolve. Under such a state of the law, the plaintiff might with some propriety assume, as the leading point in her case, that the action fell within the general principle of actions on the case for enticing away a servant. But in the present state of the law on this subject, the right of the parent to have and enjoy exclusively the services and society of her female child till she arrives at the age of twenty-one years is upon a very different footing. The law of marriage entirely overrides the general principles of right of the parent to the services of the child, or the duties from one to the other as servant and master, by allowing the female child to terminate it at any moment after she arrives at the age of twelve years, by uniting herself to some one in marriage. If the marriage of the daughter was a legal act, from the time of its consummation the daughter was legally discharged from all further duties to perform service for her parent, having assumed new relations inconsistent therewith.

The only question, therefore, is, whether the marriage of the daughter was a legal one. That question has been already substantially decided in the case of *Parton v. Hervey*, 1 Gray, 119, which was a case of *habeas corpus* brought against the present plaintiff by Parton, the alleged husband, for imprisonment of the daughter and restraining her liberty. It that case it was decided that this marriage of the daughter with Parton, although she was only thirteen years of age, and although made without the consent of her parent, and in violation of the provision of the revised statutes, c. 78, secs. 15, 19, which prohibits magistrates or ministers, under a penalty, from solemnizing the marriage of a female under the age of eighteen years without the consent of her parent or guardian, yet was a valid marriage.

While it is true that ordinary contracts, if prohibited by a penal statute, are held illegal and invalid, yet in the case of marriage this principle has been, for sound and obvious reasons, disregarded, and the marriage held valid, notwithstanding the penalty incurred by those who should unite a female in marriage under eighteen years of age without the consent of her parent or guardian.

This view of the case settles the question of the plaintiff's right to recover for loss of service of the daughter after such marriage took place, and, indeed, substantially decides the whole case.

It is, however, attempted to maintain the action upon the ground that the defendant made a false and fraudulent representation to the town clerk, and thereby procured a marriage certificate for the daughter, and thus fraudulently deceived the magistrate who officiated at the marriage. Such fraud, if any existed, would furnish no cause of action for the mother, however it might be as to the other parties affected thereby. As a criminal offense, the fraudulently and deceitfully enticing away of any unmarried female under the age of sixteen years, without the consent of her parent or guardian, for the purpose of effecting a clandestine marriage, is made severely punishable by the statutes of 1852, c. 254. Town clerks are also, under a penalty, forbidden to issue any certificate of intentions of marriage to any female under eighteen years of age, except upon the application of the parent or guardian, or with their consent in writing. If these are not sufficient guards to prevent clandestine marriages, it will be for the legislature to make such further provision as they may deem useful.

In the opinion of the court, the proper instruction to the jury would have been that the plaintiff was not entitled to maintain

her action upon the case disclosed. This, we think, should have been done, although no demurrer had been filed under the provisions of the statutes of 1852, c. 312, secs. 17, 21.

Exceptions sustained.

PROCURING CHILD'S MARRIAGE WITHOUT PARENT'S CONSENT.—No action lies by a parent for procuring the marriage of his infant child without his consent: *Jones v. Tevis*, 14 Am. Dec. 98.

PARENT'S REMEDY FOR ENTICEMENT OR ABDUCTION OF HIS INFANT CHILD is in the nature of an action of trespass, and is founded on the loss of service: *Vaughan v. Rhodes*, 13 Am. Dec. 713, and note 715, discussing the subject at some length; *Jones v. Tevis*, 14 Id. 98.

CONTRACTS PROHIBITED BY PENAL STATUTE ARE VOID, whether expressly so declared or not: *Columbia Bank Co. v. Haldeman*, 42 Am. Dec. 229, and collected cases in note to same 230; *Harrison v. Berkley*, 47 Id. 578, and note 584; note to *Leavitt v. Palmer*, 51 Id. 343, discussing the matter; *Rice v. Maxwell*, 53 Id. 85; *Ohio L. I. & T. Co. v. Merchants' etc. Co.*, Id. 742, and note 770.

THE PRINCIPAL CASE WAS CITED in *Hubbard v. Mosely*, 11 Gray, 173, in support of the proposition that it is competent for a defendant to object that a promissory note sued upon, when offered in support of the declaration, does not maintain the action; and that while he may raise the same question by demurrer under the practice act, referred to in the syllabus above, yet it does not follow that he is precluded from making the same objection at a subsequent stage of the case, particularly where the contract given in evidence is one upon which the plaintiff cannot maintain an action in her own name in any form.

SAWYER v. WOODBURY.

[7 GRAY, 499.]

JUDGMENT NOT CONCLUSIVE.—In action for several breaches of covenant in lease of real estate, all denied in answer, general verdict and judgment for nominal damages are not of themselves conclusive evidence of one of the breaches, in subsequent action by lessee against lessor, for entering and expelling him from the premises for such breach.

JUDGMENT CONCLUSIVE.—In action for several breaches of covenant in lease of real estate, all denied in answer, general verdict and judgment for nominal damages are conclusive in subsequent action by lessee against lessor for entering and expelling him from the premises for such breach, if other evidence is adduced that the issue upon that covenant was submitted to the jury in the former action; but the burden of proof is on defendant.

ACTION of tort for breaking and entering plaintiff's close. Verdict for defendant. The other facts are stated in the opinion.

J. P. Healy, for the plaintiff.

R. Choate and J. W. Hubbard, for the defendant.

By Court, SHAW, C. J. This is an action of tort, in which the plaintiff alleges his possession of a close at East Boston, a wrongful entry thereupon by the defendant, expelling the plaintiff therefrom, and holding him out to the time of the commencement of the suit.

The plaintiff's claim of title was upon a lease for five years, made to him by the defendant, of a wharf at East Boston, with a patent planing-machine upon it, of which the defendant was the patentee, together with a steam-engine, boiler, and apparatus for carrying on the same.

The defendant, by his answer, admitted the lease by himself to the plaintiff; but averred that there was a stipulation contained in it, on the part of the lessee, that if he should, during the term, make or suffer any strip or waste upon the premises, the lessor should have the right to enter and take possession of the same, and expel the lessee therefrom; and that the lessee did so make and suffer strip and waste of the premises, whereupon the defendant did enter and expel the lessee, as he lawfully might.

The defendant having thus admitted the plaintiff's title, and set up matter of avoidance by the answer, the burden of proof was plainly on him to prove the fact on which his justification rests, namely, that the plaintiff had committed or suffered strip and waste on the premises, and so warranted the defendant's re-entry under the right in that event reserved.

This the defendant offered to do, by giving in evidence a verdict and judgment in his favor in a former suit in another county, in which the present defendant was plaintiff, and the present plaintiff was defendant. It was an action of contract on the same lease hereinbefore mentioned, in which there was a great number of stipulations and covenants on the part of the lessee, upon several of which the lessor, in his former action, had assigned breaches, and for which he claimed damages. In his answer in that suit the defendant therein denied, generally and specifically, all the breaches alleged, and denied that he had committed any breach of the covenants in said lease, but said that he had faithfully and fully performed all his covenants. That case, it appears, went to trial on the issues thus formed, upon which, after a full hearing, the jury returned a verdict for one cent damages for the plaintiff.

The defendant's counsel insisted that the question of the lessee's having made strip and waste being assigned by the plaintiff in the former suit as a breach of covenant, and denied by

the defendant, was a fact put in issue; and there being a general verdict for the plaintiff, this fact was found to be true, it must be deemed in law to be conclusive between the same parties in this suit, and thus the fact upon which the defendant founds his justification in this suit is definitively established. The judge before whom this action was tried took this view of the law, and held that that verdict and the judgment thereon were conclusive in favor of the defendant, as proof of the strip and waste on which he relies for his justification in this action. This is the point which we are called on to revise.

This decision, we apprehend, carries the doctrine of *res judicata* somewhat beyond the line warranted by the authorities, and overlooks some of the limitations and modifications with which that highly beneficial rule is surrounded. It is a principle lying at the foundation of all well-conducted jurisprudence, that when a right or a fact has been judicially tried and determined by a court of competent jurisdiction, the judgment thereon, so long as it remains unreversed, shall be conclusive upon the parties and those in privity with them in law or estate. The ground of such principle, we think, when rightly understood, is that it presents evidence of a fact of so high a nature that nothing which could be proved by evidence *aliunde* would be sufficient to overcome it; and therefore it would be useless for a party against whom it can be properly applied to adduce any such evidence, and accordingly he is estopped or precluded by law from doing so. Such is the character of an estoppel by matter of record, as in case of an issue on a question of fact judicially tried and decided.

But this estoppel is attended with conditions and qualifications which must be strictly observed, without which it would sometimes operate harshly by excluding the truth. It must be an averment of a fact precisely stated on one side and traversed on the other, and found by the jury affirmatively or negatively, in direct terms, and not by way of inference. It is not necessary that the action in which it is found, and that in which it is relied on as an estoppel, should be of the same kind or for the same cause of action. If a question upon the execution or validity of a deed in fee be put in issue in an action of trespass, and expressly found by the jury, such verdict and the judgment upon it may be relied on as conclusive evidence of such fact, on the trial of a real action or writ of right between the same parties for the same estate. It has become a fixed fact between these parties for all purposes.

The principle of this rule, the grounds on which it is founded, with its proper limitations, are very satisfactorily stated in *Outram v. Morewood*, 3 East, 846. It was recognized in this commonwealth, though the previous verdict and judgment in that case were not such as to satisfy the rule, that the verdict must be directly on the fact, and not by way of inference, in *Spooner v. Davis*, 7 Pick. 147.

Since special pleading has been entirely abolished by statute in this commonwealth, and a general declaration and a general answer substituted, it is rare to find a record where such specific fact has been put in issue and found; and future cases will become more so. Of course it will be more difficult for litigant parties to avail themselves of the principle by way of estoppel, because it will be more and more rare to find a case where such plea can be supported by matter of record. But the principle is not lost sight of where, between the same parties or their privies, a case has been tried upon a general issue; if a particular controverted question of fact has been submitted to a jury, and a verdict returned embracing it, though not to be pleaded as an estoppel, it is evidence, and under many circumstances very strong evidence, upon the same question of fact when it arises in another suit. So it was held, and the reasons for it assigned, in *Eastman v. Cooper*, 15 Pick. 276 [26 Am. Dec. 200]. And in the same case it was held that where the fact in controversy, together with many other questions of fact, are within the issue of the case, in a subsequent case, where such finding is relied on, it is competent for the party offering it to go into evidence *aliunde* to prove that such particular question was actually contested and submitted to the jury, and the verdict was such as to show that they passed upon it. The same principles are recognized and affirmed in the recent cases of *Dutton v. Woodman*, 9 Cush. 255 [57 Am. Dec. 46], and *McDowell v. Langdon*, 3 Gray, 513.

Taking these to be the settled rules on the subject, the court are of opinion that the ruling of the judge in the present case, that the verdict and judgment in the former case were conclusive evidence for the plaintiff in the present case, cannot be supported. It is true that the question of strip and waste was in issue in the former case, because that breach was assigned, and traversed in the answer, and therefore was in issue, and might have been tried and passed upon. But many other breaches were assigned, having no relation to waste; and therefore a general verdict for the plaintiff, with nominal damages, left it

wholly uncertain, without other evidence, whether the fact was actually submitted to the jury and passed upon by them or not; and we think the evidence offered by the plaintiff to prove that it was not should have been received, though the burden of proof was on the defendant. Many of the breaches assigned in the former suit were wholly independent of the use of the premises, or of the machines, engines, and boilers; such as failing to recommend the plaintiff's patent right to the favorable notice of purchasers; not doing all in his power to bring the Woodbury patent machines into notice and good repute; refusing to exhibit the same to those who called to see the machine operate; slandering the plaintiff's patent right, and the like. Upon any of these, the verdict for the plaintiff for nominal damages might have been given.

The court are therefore of opinion that the ruling of the judge, that the evidence in question was conclusive, was incorrect.

New trial ordered.

FORMER JUDGMENT, WHEN CONCLUSIVE.—This subject is discussed at some length in the note to *Doty v. Brown*, 53 Am. Dec. 355. It seems to be conclusive only as to matters directly in issue, or which might have been litigated. See note to *King v. Chase*, 41 Id. 681, discussing the question; *Agnew v. McElroy*, 43 Id. 772, and cases referred to in note thereto 774; *Wilson v. Stripe*, 61 Id. 138; note to *Lee v. Kingsbury*, 62 Id. 550; *Freeman on Judgments*, sec. 272.

PAROL EVIDENCE IS ADMISSIBLE TO SHOW WHAT MATTERS WERE PASSED UPON IN FORMER ACTION, as the record sometimes fails to show it: See note to *Young v. Rummell*, 38 Am. Dec. 597; *King v. Chase*, 41 Id. 675; *Doty v. Brown*, 53 Id. 350, and note 356, discussing the question; *Emery v. Fowler*, 63 Id. 627, and collected cases in note to same 633; *Freeman on Judgments*, sec. 273.

CITATIONS OF PRINCIPAL CASE.—That facts may be shown to exist which were not litigated or drawn in question in a former suit, and which will support a subsequent action: *Stevens v. Taft*, 8 Gray, 420. That if a party intends to claim, by way of damages for non-performance of contract, more than the amount for which he is sued on the contract, he must not rely on the contract in defense, but must bring a cross-action and apply to the court to have the cases continued so that the executions may be set off. He cannot use the same defense, first as a shield, and then as a sword: *O'Connor v. Varney*, 10 Id. 231. That a judgment for plaintiff in an action to recover an installment of interest on a promissory note, in defense to which want of consideration is relied on, is conclusive evidence of consideration in a subsequent action between the same parties to recover the principal of the note: *Black River Savings Bank v. Edwards*, Id. 397. That verdict and judgment are conclusive between parties to the record as to fact put in issue and determined in former action, and cannot again be litigated between them: *Jennison v. Inhabitants of West Springfield*, 13 Id. 545; *Burien v. Shannon*, 14 Id. 437; *Jamaica Pond Ag. Corp. v. Chandler*, 121 Mass. 2. That parol evidence is not only admissible, but usually indispensable, to show what of various points

comprehended under a general plea was really in controversy, and formed the ground of decision: *Gage v. Holmes*, 12 Gray, 429; *Clapp v. Thomas*, 5 Allen, 160; *Littlefield v. Huntress*, 106 Mass. 123; *Merritt v. Moree*, 108 Id. 275; *Commonwealth v. Leonard*, 9 Gray, 287. That the trial of an action of trespass may turn upon the question of title, and if that question is put in issue, tried, and passed upon by the jury or court or referee, the verdict or finding, and judgment following it, are competent evidence of that fact in a subsequent writ of entry between the same parties, even if it does not operate as a conclusive estoppel: *White v. Chase*, 128 Mass. 158. The principal case was doubted in *Burles v. Shannon*, 99 Id. 204; see also *Perkins v. Parker*, 10 Allen, 24, commenting on the main case.

CASES
IN THE
SUPREME COURT

MICHIGAN.

LACEY v. DAVIS.

[4 MICHIGAN, 140.]

WHERE ORIGINAL PATENT IS LOST, COPY FROM RECORDS OF GENERAL LAND-OFFICE, certified by the commissioner, under the seal of his office, to be a true copy of the patent records, is admissible without further proof. Such cases are governed by the laws of the United States and the practices of the different departments.

WHERE DEED WAS EXECUTED AND ACKNOWLEDGED IN NEW YORK, although the certificate of the county clerk fails to certify that it was executed and acknowledged according to the laws of that state, it is entitled to record in this state, under the law of 1827. Consequently, the record of this deed being admissible in evidence, the original would be also, without preliminary proof.

PURCHASE OF PROPERTY, AT TAX SALE THEREOF, BY ONE IN POSSESSION.—One in possession of property as a trespasser, or under color of title, by suffering the same to be sold for taxes and becoming a purchaser at such sale, acquires no additional title. Every act of his which is in obedience to a law imposing such burden upon the land must be regarded as done by him by reason of his own claim of title, and in protection thereof; and he cannot thereby acquire a new or superior title, as every such act is deemed to be subordinate to his own title. That such taxes were a lien upon the land, at the time of his entry thereon, makes no difference, nor does it matter in whose name the property was assessed.

SUCCESSIVE PURCHASES OF SAME PROPERTY, AT DIFFERENT SALES THEREOF, FOR DELINQUENT TAXES, do not operate to strengthen the title first acquired.

UNDER STATUTE WHICH REQUIRED SALE OF LAND FOR TAXES TO BE MADE ON FIRST MONDAY IN MONTH, and to be continued from day to day until the amount has been realized, a deed which recites that the sale took place on the eleventh of the month is not invalid, nor does such recital throw the burden of proof upon the defendant. The law may have been complied with, and it is for the plaintiff to show that it was not.

ASSESSMENT ROLL NEED NOT BE SIGNED, UNDER LAW OF 1842. The signature of the assessor to his certificate attached thereto is sufficient.

WHERE LAW REQUIRES BOARD OF SUPERVISORS IN PROPER CASE TO EQUALIZE ASSESSMENTS, and no record of such equalization exists, the presumption is that no cause existed requiring it.

PRESUMPTION IS THAT ALL SUPERVISORS OF COUNTY, OR AT LEAST QUORUM, WERE PRESENT at the transaction of any business. If the contrary was the fact, it must be affirmatively shown.

SIGNATURE OF PRESIDENT OR CLERK OF BOARD OF SUPERVISORS IS NOT NECESSARY TO VALIDITY OF RECORD OF THAT BODY. The law requires that they should keep a record, but does not require that it be signed, and the omission of such signature is at most only an irregularity.

ADDITION OF TEN PER CENT TO ALL TAXES BECOMING DELINQUENT, being done by virtue of a statute authorizing such addition, cannot be objected to as excessive.

SALE OF LAND FOR TAXES, PART OF WHICH WERE ILLEGAL, IS VOID IN ACTION OF EJECTMENT, where the validity of the sale depends upon the validity of the tax and subsequent proceedings. In personal actions against the collector it is different. If the illegal part can be separated, it alone is rejected.

LAW, BY MAKING TAX DEEDS PRIMA FACIE EVIDENCE OF REGULARITY OF ALL PROCEEDINGS up to their date, shifted the burden of proof from the holder of the title to the adverse party. To invalidate the deed, or to throw the burden upon the former, the latter must show irregularities of such a nature as to require explanation or counter-proof; they must be of matters which are peremptory, and not directory. It is not sufficient to cast a general doubt over the title, but it is necessary to point out some specific defect, or raise a reasonable presumption against the sufficiency of some specific act, or of the non-performance of some necessary duty.

EJECTMENT. Upon the trial, the circuit judges found the facts, and certified them up to this court. Plaintiff, to prove title in himself, showed a conveyance from the United States to one Peabody, and a chain of conveyances from the latter to himself. Defendant objected to the proof of the patent to Peabody, which was shown in the manner stated in the opinion, upon the ground that the certificate of the commissioner did not state that it was an exemplification of the whole record. One of plaintiff's deeds was executed in New York, and he offered to prove it from the record thereof in Ingham county. The certificate of the county clerk of New York failed to state that the acknowledgment and execution of the deed were in accordance with the laws of that state, and the record was ruled out. Plaintiff then produced the original deed, and, over the objection of defendant, proved it by other evidence. Defendant, to establish his title, produced a deed from the auditor general to one Raynor. The deed was dated March 9, 1847, and recited a sale of the premises October 11, 1844, for the delinquent taxes of 1842.

Plaintiff objected to this deed, upon the ground that the sale therein recited as having taken place October 11th should have been made on the first Monday in October. Defendant then produced a deed from the auditor general to one Smith. The deed was dated January, 1844, and recited a sale of the premises October, 1843, for the delinquent taxes of 1839. This deed was objected to, upon the ground that the title claimed thereunder was cumulative of that claimed under the above-mentioned deed. He next introduced a deed from the auditor general to John Raynor, made in pursuance of a sale of the premises for the delinquent taxes of 1844. An objection, similar to the above, was made to this deed, but it was overruled, and the deed admitted. Defendant next offered a deed from the same grantor to Raynor, made in pursuance of a sale of the premises for the delinquent taxes of 1846. Also a deed between the same parties, in pursuance of a sale of the premises for the delinquent taxes of 1848. To each of these deeds the objection was made that the title claimed thereunder was cumulative; also that according to defendant's own confession they were in possession of the premises prior to these sales. The objection was sustained by the court, and the deeds ruled out. Plaintiff now introduced evidence showing that Raynor went into possession of the premises under a deed from L. C. Smith, dated May 10, 1844, and that he delivered up possession to defendant Davis, who has ever since held possession for Raynor. The remaining points raised in the case are stated in the opinion.

O. M. Barnes and A. Blair, for the plaintiff.

E. W. Morgan, for the defendants.

By Court, MARTIN, J. The plaintiff's evidence of title was properly admitted. In case of loss of original patent, a copy from the records of the general land-office of the United States, certified by the commissioner, under the seal of the office, to be a true and literal exemplification of the patent records, as in this case, is inadmissible without further proof. The provisions of chapter 102 of our revised statutes, respecting evidence, have no relation to such cases, as they are governed by the laws of the United States, and the practices of the different departments.

The deed subsequently offered, and through which the plaintiff deduces his title, were properly executed so as to entitle them to record. This was expressly adjudged by this court in *Ives v. Kimball*, 1 Mich. 308, when the validity of a record of a deed, executed under the law of 1827 (the same under which

the deeds in question were executed), was under consideration, and the record was admitted to be read in evidence. The records being admissible, the originals were also, without preliminary proof. Such proof was, however, made in this case by proving the handwriting of the subscribing witnesses, and of the grantors, after showing that they were non-residents of this state at the time of their execution, and this was *prima facie* sufficient.

To maintain the defense, certain deeds, executed by the auditor general upon sales of the lands in question for delinquent taxes, were offered in evidence. To the admission of these deeds numerous objections were made. The first deed in order of time was to Luther C. Smith, dated in January, 1844, for the taxes of 1839. To the reading of this deed, as well as to its validity, several objections were made, but as the court below found that the assessment roll, upon which the tax was based, was not signed by the assessors, and as this is a fatal error under the ruling in *Sibley v. Smith*, 2 Mich. 486, we do not regard it necessary to consider them further, and especially as every material objection to its validity is raised in the objection to the subsequent deeds.

Under this deed, it appears that Smith entered into possession of the premises in question in March, 1844, made some improvements thereon, and conveyed the same to John Raynor by deed, May 10, 1844; and that at the time of such conveyance Smith surrendered the possession to Raynor, and that the defendants have since held possession under him. Subsequent to this conveyance from Smith to Raynor, it appears that Raynor bid in this land for the taxes of 1842, at a sale made in October, 1844, and received his deed therefor in 1847. This deed was offered in evidence, and several objections made thereto by the plaintiff.

Among other grounds of objection, it is insisted that it conveyed no title, as Raynor was in possession under color of title taken under the deed of January, 1844, and was bound to pay all taxes which were a lien upon the land at the time of taking such possession, as well as all burdens which might subsequently accrue. At the time of the entry by Smith, the tax of 1842 was a lien upon the land, and it so remained until after the purchase by Raynor. By entering into possession, Raynor acquired an absolute title as against Smith, and as against all the world except the present plaintiff; and whether as against him, would depend upon the validity of Smith's title, and this, as he entered under it, he is estopped from questioning. Were he

to deny the validity of the title of Smith, he would admit himself to be a trespasser upon the plaintiff; and while such, he could acquire no title adverse to the plaintiff by discharging any burden which the state imposes upon the land or upon the owner, in virtue of its pre-eminent sovereignty, for this would permit him to take advantage of his own wrong; and if his possession is adverse to the plaintiff, and under color of title, every act of his which is in obedience to a law imposing such burden upon the land must be regarded as done by him, by reason of his own claim of title, and in protection thereof; and he cannot thereby acquire a new or superior title, as every such act is deemed to be subordinate to his own title, and cannot be adverse to it. Thus, in *Douglas v. Dangerfield*, 10 Ohio, 152, it was held that one in possession of lands claiming title, and in whose name it is listed for taxation, acquires no additional interest by suffering the land to be sold for taxes and purchasing the same himself. The same doctrine is held in *Ballance v. Forryth*, 13 How. 18; *Chambers v. Wilson*, 2 Watts, 495; *Voris v. Thomas*, 12 Ill. 442; and *Glancy v. Elliott*, 14 Id. 456. It is also recognized in *Blakely v. Bestor*, 13 Id. 708, where it was held that upon proof of the mere fact of possession by the defendant at the time of the assessment and sale, the court would not presume him bound to pay the taxes, because, says the court: "He may occupy them as a tenant under an agreement that his landlord shall pay the taxes, and in such case there could be no obligation on the tenant to pay them, particularly if, in pursuance of the agreement, they were listed for taxation in the landlord's name."

But upon the introduction of the tax deed by the defendant, "it would be competent," the court says, "for the plaintiff to avoid it by proving that the defendant occupied a position while it was maturing which made it his duty to have paid the taxes, and which forbid his taking advantage of a title acquired through his default." So a purchaser at a tax sale of lands in which he has an interest as heir acquires no additional title: See *Choteau v. Jones*, 11 Ill. 300 [50 Am. Dec. 460]; *Piatt v. St. Clair's Heirs*, 6 Ohio, 227. In *Douglas v. Dangerfield*, *supra*, and in some of the other cases above cited, the land appears to have been listed for taxation in the name of the occupant claiming title, but we apprehend that no material difference exists between such a case and one in which it was listed or assessed as "non-resident," or to a person having no title or claim of title. The listing is based upon the fact of possession under a claim of title, and it

is the possession which creates the disability in the purchaser. Were the assessor to omit, for any reason, to assess the land against such possessor, or to assess it to a wrong person, we are at a loss to perceive upon what principle such possessor, any more than the owner under any other title, would, by that omission, acquire any additional or new interest by suffering the land to be sold for taxes and bidding it in himself. The principle upon which these decisions rest grows out of the nature of the proceedings under which the sales for taxes are made. The state, for the support of government, in the exercise of its eminent domain, imposes the burden of taxation upon all persons and property within its limits. If such taxes are not paid, and real estate be the subject of taxation, it condemns the land for the default, and this condemnation is wrought out by its sale. The title acquired by such sale has nothing to do with the previous chain of title, nor does it in any manner connect itself with it. It is a breaking up of all titles, and operates, not to support, but to destroy them: *Gwynne v. Niswanger*, 20 Ohio, 556.

It would therefore involve an absurdity to say that a subsequent title acquired at a tax sale, and which breaks up and destroys all prior titles, operates at the same time to strengthen such prior title. Nor does the fact that the tax title of 1842 was a lien upon the land at the time possession was taken by Smith enable the defendants to avail themselves of the sale for that tax. The land was purchased for the tax of 1839, with this burden upon it; and by entering into possession under that sale, Smith, and afterwards Raynor, was bound, in virtue of such possession, to discharge the lien for the protection of the title under which he occupied. By a voluntary payment he would not strengthen his title, and by suffering the land to be condemned and sold to discharge such lien he could, as we have seen, neither strengthen it nor acquire a new one. The law neither puts nor does it intend to put the possessor of lands claiming under a tax title in any better condition than that of a possessor under any other title; and it is only by the purchasing in of those adverse or outstanding that the latter can strengthen his original title, and this can never be done by removing liens or incumbrances which are founded only upon duty or in contract. Possession is voluntary, and when the purchaser has such confidence in the validity of his title that he is willing to enter upon and enjoy the possession and permanency of the profits, then, if not before, the obligation to discharge the burdens which

the law has imposed upon the property for the support of the government attaches to him, and whether those burdens already exist as liens, or are thereafter created, his duty is the same. This is an obligation incident to every title and to every possession under color of title. A party, therefore, who enters upon the possession of land under one or a series of tax titles should see to it that he has such a title as will warrant him in incurring the liabilities incident to that possession. In imposing this rule, the law only applies in his case the obligation which is incumbent upon every other purchaser of land, to take care that he has a good title if he would derive benefit from it or enjoyment under it.

Having arrived at this conclusion, we should deem it a duty, under ordinary circumstances, to pass by the objection stated to the assessment and tax for the years of 1842 and 1844. But as many of the questions are of great practical importance, and of frequent recurrence at the circuit, we do not feel at liberty so to do. And first, it is objected to the deed for the tax of 1842, that the sale did not take place on the day fixed by law, and no reason therefor appears. It appears that the land was sold on the eleventh day of October, 1844. By the act of 1843, which governed this sale, it was to commence on the first Monday in October, and to be continued from day to day until so much of each parcel charged with taxes should be sold as should be sufficient to pay the taxes, interest, and charges: See Sess. Laws, 1843, pp. 79, 88, secs. 61, 76. No evidence appears of this fact, except the recital in the auditor general's deed. Under the ruling of this court in *Sibley v. Smith*, 2 Mich. 486, this would not be evidence sufficient to invalidate the sale, nor shift the burden of proof upon the defendants. For aught that appears, the return of the county treasurer to the auditor general may have shown a compliance with the statute, and it was for the plaintiff to show that it did not.

There is nothing in the second objection, as the finding of the court below shows a sufficient compliance with the law, and record of the township vote.

It is thirdly objected that the assessment roll was not signed. It appears, however, that the certificate of the assessors required by the law of 1842 was attached and signed. The law of 1842, p. 85, unlike the revised statutes of 1838, does not require such signature to the roll, and in this respect this case is distinguishable from that of *Sibley v. Smith*, *supra*, and the adjudications in other states, to which we are referred in the plaintiff's brief.

We do not, therefore, regard the want of signature as an objection, the certificate being the only authentication of the roll required by law.

It is fourthly objected that there was no equalization of the assessment rolls by the board of supervisors, or apportionment of taxes by them, entered at large upon the journal of the board.

The ninth section of the act of 1842 requires an equalization of the rolls to be made at the July session in each year, whenever the board shall deem the relative valuation of the real estate in the respective townships to be disproportionate; and the presumption of law, in the absence of a record of equalization, is that none was made, because no cause was found to exist requiring it.

The apportionment of taxes is required by the act, section 14, to be made and entered upon the journal of the board at its September session; and as the records of that session were not produced by the plaintiff, nor any evidence offered respecting them, we can infer nothing against the validity of the tax under this objection; nor was the burden of showing the entry to have been made cast upon the defendants by the proof offered.

The same remarks are applicable to the fifth objection. The proceedings of the board at its July session, however irregular, will not warrant any presumption respecting their proceedings at the September session, or change in any degree the burden of proof.

It is sixthly objected that the record of the July session is defective and void, in not showing who constituted the board, or that a quorum was present, and for want of signature or authentication by the clerk or presiding officer of the board. So much of the record as is exhibited in the case shows that the board of supervisors met on the twenty-ninth of July and proceeded to business. The inference is that all the supervisors of the county were present, or at least a quorum. If the contrary was the fact, it should have been affirmatively shown. Nor do we regard the signature of the president or clerk necessary to the validity of the record. The law requires one to be kept, but does not require it to be signed by any one. While it is proper and desirable that these records should be signed, yet we do not regard the omission as a fatal error, but at most only an irregularity. If, as we must presume, the plaintiff found the records in the proper place of their custody, his production of them estops his denying them to be the records of the board. He can hardly be permitted to base his objections upon the rec-

ords, and still deny such records. Even the want of a signature of the presiding judge to the journal of a court, although required by law, does not vitiate the record (see *Bartlett v. Lang*, 2 Ala. 161), if sufficient in other respects; and in case of the records and journals of public bodies, the only prerequisite to their admissibility as evidence is that they be produced from the proper place of custody and shown to have been kept by the proper officer.

The seventh objection is, that the amount for which the land was sold was excessive, and the sale was therefore void. The tax was thirteen dollars and eighty-two cents. By the requirements of law ten per cent was to be added to all taxes remaining unpaid on the first of February. This addition of ten per cent is objected to as excessive; but as it was imposed by virtue of the statute, we perceive no force in the objection.

Most of the objections to the tax of the year 1844 are the same as those made to that of 1842, and have been already considered. Two objections, however, remain as to this tax.

First, it is objected that the records of the board of supervisors show the equalization of the assessed property to be irregular, inasmuch as it includes the real and personal property together; but the case does not show sufficient to enable us to determine the question raised by it.

The only other objection which we propose to consider is, that the township tax of ninety dollars and sixty-four cents was wholly unauthorized, none having been voted by the electors or by the town board. The authority to levy a township tax is based upon the previous action of the township—either the electors, or the town board, as the case may be—and the supervisor cannot levy a tax at his discretion. In this case, the court below finds a total absence of such authority, and that portion of the tax is therefore void. This doctrine of excess of taxes has been frequently before the courts, and is surrounded by many difficulties. There is no principle, however, upon which this excess can be sustained. In personal actions against the collector and others for collecting or attempting to collect such tax, courts have held that when the tax was divisible, and the excess could be ascertained, such excess might be rejected, and the balance of the tax held good; but that principle has no application to cases of ejectment, where the validity of the title depends upon the validity of the tax and subsequent proceedings, and where, from the very nature of things, there can be no separation of the good from the bad. It is only applicable in personal actions or in

direct proceedings to collect the tax, and does not operate upon property acquired upon tax sale: See the numerous cases in the notes to chapter 6 of Blackwell on Tax Titles, 184 et seq.

In testing the validity of tax titles, we are too apt to lose sight of the fact that by making the deed *prima facie* evidence of the regularity of all proceedings to its date, our law has shifted the burden of proof from the holder of the title to the adverse party. The holder of the title, instead of being compelled to establish the regularity of all proceedings upon which his title is based, may repose upon his deed until the opposite party introduces such evidence as, in the absence of all counter-testimony, will afford reasonable ground for presuming the proceedings anterior to the deed to be irregular and insufficient to sustain the title. When this is shown, the burden of proof is thrown upon the holder of the title, and the common-law rule so far restored: See *Sibley v. Smith*, above cited.

The great difficulty is to determine when that burden is shifted, and this must in a great degree depend upon the circumstances of individual cases. In the present case we have considered and determined the objections raised, upon the principle that the evidence sufficient to change the burden of proof must be such as to exclude any reasonable presumption of regularity; in other words, that the evidence of irregularity must be such as to require explanation, or counter-proof, and must be of matters which are peremptory, and not directory, and that it is not sufficient to cast a general doubt over the title, but that it is necessary to point out some specific defect, or raise a reasonable presumption against the sufficiency of some particular act, or of the non-performance of some necessary duty. It is in this way only that we can secure to the statute a rational interpretation and reasonable effect.

Certified accordingly.

"IT IS UNIVERSAL PRINCIPLE that one who ought to pay the taxes on property cannot, by omitting to do so, purchase at a sale of the property for the non-payment, and thereby strengthen his title:" Note to *Blake v. Howe*, 15 Am. Dec. 634, citing a large number of cases, and discussing this question at length.

AS GENERAL RULE, PARTY CLAIMING TITLE UNDER COLLECTOR'S SALE FOR TAXES must show affirmatively a compliance with every substantial requirement of the law. A tax collector's deed is not even *prima facie* evidence in favor of the purchaser's title, but must be sustained by proof of extraneous facts: *Lyon v. Hunt*, 46 Am. Dec. 216; *Brown v. Wright*, 42 Id. 481; *Dikeman v. Parrish*, 47 Id. 455; *Scales v. Alvis*, 46 Id. 269; note to *Jackson v.*

Shepard, 17 Id. 505. But the legislature has undoubted power to make tax deeds *prima facie* evidence, not only of the regularity of the sales upon which they are based, but also that the prerequisites of the sales have been complied with: Note to *Jackson v. Shepard*, 17 Id. 508, where the question is discussed at length.

COPY OF UNITED STATES LAND PATENT, properly certified, is admissible in evidence upon proof of the loss of the original: *Stephenson v. Doe*, 46 Am. Dec. 489, and note.

THE PRINCIPAL CASE IS CITED to the point that under the statute the burden of proof is on the party claiming against a tax deed, and that all presumptions are in favor of the validity of the same, in *Amberg v. Rogers*, 9 Mich. 339; *Wright v. Dunham*, 13 Id. 416; *Case v. Dean*, 16 Id. 34. It is cited in *Dubois v. Campus*, 24 Id. 360, where the court decide that one in possession of land, claiming it as his own, is bound to pay the taxes imposed upon it which became due during such possession, and if he neglects this duty, and suffers the land to be sold for taxes, and bids it in himself, he can acquire no title thereby as against any one, and certainly not as against a cotenant—such sale being based upon his own default; and in *Gilman v. Riopelle*, 18 Id. 145, where the court hold that this rule does not require that such a deed should be excluded when the possession is disputed, nor if the possession at the time were undisputed would it be sufficient ground for rejecting the deed, as that fact would go to the validity of the deed, and not to its admissibility. The doctrine of estoppel as to the purchase at a tax sale subsequently made, by one who went into possession of land under claim of title while a tax upon it remained unpaid, as applied in the principal case, is criticised in *Blackwood v. Van Vliet*, 30 Id. 119. It is cited to the point that the ordinary presumption is that officers perform their duty, in *Upjohn v. Richland*, 46 Id. 545; and in *Silsbee v. Stockle*, 44 Id. 563, to the point that the levy of an excessive tax is sufficient to defeat any sale made for an aggregate of taxes of which the excessive tax formed a part. It is cited in *Clark v. Hall*, 19 Id. 371, to the point that a certificate of the commissioners of the land-office is sufficient to authenticate any record of his office.

CRANSON v. CRANSON.

[4 MICHIGAN, 230.]

DOWER.—A husband secretly executed a deed to his sons immediately before his marriage; the court conclude from a review of the evidence that the deed was without consideration, and was not delivered until after the grantor's marriage: *held*, that his widow was entitled to dower in the land, upon two grounds: 1. Because the husband was seised of the land during coverture; 2. Because, had the deed been delivered at its date, its execution was fraudulent as to the widow, being executed secretly for the purpose of cutting off her dower.

DELIVERY OF BILL OF SALE, WHETHER TRANSACTION WAS GIFT OR SALE, consummates it and makes it valid; and in the absence of fraud, a wife cannot claim her distributive share of goods thereby conveyed by her deceased husband.

WIFE CANNOT CLAIM PAYMENT FOR SUCH PROPERTY AS SHE MAY BRING INTO HER HUSBAND'S HOUSEHOLD upon their marriage, and which they use and enjoy together, in the absence of an express contract to that effect. No implied contract exists by virtue of the marital relation.

APPEAL from the circuit court. The opinion states the facts.

A. Blair, for the complainant and appellee.

Livermore and Wood, for the defendants and appellants.

By Court, MARTIN, J. From the testimony, it appears that prior to the sixth of August, 1848, Thomas Cranson was seised and possessed of the lands in question, and that on that day he executed the deed in question, at the house of one John Pratt, distant about five miles from his own residence. That at the time he executed the deed he requested that the transaction should be kept secret, and said he wanted the witnesses to say nothing about it, not even to their own families, nor to any of his children, assigning as a reason for such request that he was about getting married, and he thought it his duty to provide for his own children; that the children of the woman he was going to marry had an estate they were getting something from, and that he would have one hundred acres left, which would be a good home for the widow, etc. He further said that he should keep the deed himself, and give it up to the boys when he got ready; and that in the mean while he did not wish that they ("the boys") should know anything about it. It further appears that he took the deed away with him.

Of the fact of delivering the deed before the marriage we have no evidence. This was attempted to be established by the testimony of Lucy P. Wade, who swears that about a week before the marriage, Thomas Cranson requested Mrs. Franklin Cranson, who was the wife of one of the grantees, and who, it appears, resided in his family, to get "them" papers and take care of them; and that shortly afterwards she saw Mrs. Cranson return into the room with a paper, which, from the way it was folded up, she took to be the deed. She further states that "the old gentleman said he wished the boys to have shares of the property alike." But this testimony falls far short of establishing such fact. Indeed, the natural conclusion, even if the paper folded so as to lead the witness to believe it was such deed, is that he still retained the paper, and requested Mrs. Cranson to keep it for him, and not for the grantees. Why he should at that time have made the gratuitous remark about his desire that "the boys" should share the property alike, when

so small a portion of his property was covered by the deed, requires explanation before the rights of the complainant shall be determined by this portion of her testimony.

But the answer of the defendants, coupled with the testimony offered to establish its truth, clearly negatives the presumption of delivery before marriage, and almost necessarily leads us to the conclusion that the transaction was a deliberate fraud upon the complainant. It is true, the answer is not put in under oath, yet we may fairly presume that if the transaction had been fair and honest the answer would have so shown it, and been so framed as to have been sustained by the proof, if proof was to be had. Yet the answer alleges that the consideration of the deed was a life lease from the grantees to the grantor, executed at the same time with such deed. The testimony already referred to, of the facts attending the execution of the deed, flatly contradicts the answer in this respect, and repels any presumption of such a consideration. In addition to this, Lewis Wood, the surviving witness to the lease, testifies that he subscribed it in September, 1852, and his evidence satisfies us that it was then executed. The fact that the deed was recorded in the month of September, 1852, and shortly after the transaction testified to by Wood, is further corroboration of the charge of non-delivery until that time. The conclusion from all the testimony, taken in connection with the answer of the defendants, is that the deed was never delivered by Thomas Cranson until in the month of September, 1852. Upon two grounds, then, it may be held that the deed does not debar the complainant of her dower in the lands in question: 1. Because the husband was seised of the lands during coverture; and 2. Because (had it been delivered at its date) its execution was fraudulent as to the complainant, being executed secretly for the purpose of cutting off her dower, which would be in fraud of law and in fraud of her rights accrued directly on the marriage: See *Swaine v. Perine*, 5 Johns. Ch. 482 [9 Am. Dec. 318]; *Littleton v. Littleton*, 1 Dev. & B. L. 327; *Killenger v. Ridenhouser*, 6 Serg. & R. 531. The complainant further seeks to have the bill of sale of personal property made by her husband to the defendants, shortly before his death, set aside, and to have her distributive share of such property allowed to her. The claim is founded upon the statute: R. S., p. 284, c. 70, sec. 1; which provides that when any person shall die possessed of any personal estate, etc., not lawfully disposed of by his last will, the same shall be applied and distributed as therein provided; and gives to the widow her wearing apparel and orna-

ments, and those of her husband, the household furniture of the deceased, not exceeding in value two hundred and fifty dollars, and other personal property to be selected by her, not exceeding in value two hundred dollars.

It is perfectly apparent from the evidence in the case that Thomas Cranson did not die possessed of the property mentioned in the bill of sale, as the same appears to have been delivered to the defendants, to whom the bill of sale run, and to have been distributed amongst them prior to his death. Such delivery, whether the transaction was a sale or gift, consummated it, and made it valid: *Ward v. Turner*, 2 Ves. sen. 431; *Franks v. Noble*, 12 Id. 39. Nor was the transaction secret, so as to operate as a fraud upon the complainant, for the testimony establishes the fact that she was cognizant of it and approved it. While courts of equity are, and very properly should be, anxious to protect the wife and the widow from fraud and undue advantage, and to secure to her the benefits of the laws, wisely designed to save her from want, and will interfere to protect her from injustice and wrong, yet they can only do so upon a proper case, and the present is hardly one calling for such interference. The assent of the complainant to the transfer of this property, and her approval of the purposes of the transfer, repel any presumption of fraud in the transaction; and in the absence of fraud, the deceased had a clear right to make such disposition of his property as he might think just and proper.

The complainant further seeks by this bill to recover the value of certain personal property brought by her at the time of the marriage to the decedent, and used and consumed by him and in the family. The testimony shows that she brought into the family certain household stuff, furniture, and other property, but there is no clear proof of its amount, kind, or value. There is no evidence that this was claimed or regarded as separate property after their marriage, nor of any antenuptial contract respecting it. It appears to have been placed in the household and upon the farm, and used like the other property of her husband; and it also appears that the decedent paid debts of hers contracted before marriage, and that after his decease she took away what remained of the property brought by her, and certain other property which had belonged to the deceased. How much was used, how much was appropriated towards the payment of her debts, or how much was taken away by her, is not made known to us. There then is no equitable ground upon which to base a decree.

Nor has she any legal right to compensation for this property. As there was no express contract, so we cannot hold that, in virtue of the marital relation, any implied contract exists upon the part of the husband, binding his estate to the payment for such property as the wife may bring into his household, or may surrender to him, or which they may use and enjoy together. The law has gone quite far enough towards the destruction of the marital unity, and has afforded opportunity enough for the overthrow of domestic happiness, and sufficient occasion for contentions and domestic strife, without this court's ingrafting upon it constructions which will entail like mischiefs upon the survivor and the heirs of a decedent.

The decree must therefore be affirmed, in so far as it declares the complainant is entitled to dower in the lands in question, and in the directions given respecting the admeasurement thereof, and respecting the mesne profits; and reversed in all other particulars, with costs to the complainant; and the case remitted.

Present, MARTIN, GREEN, WING, PRATT, COPELAND, BACON, and DOUGLASS, JJ.

DOUGLASS, J., dissented from so much of the opinion as holds that the complainant is not entitled to her distributive share of the personal property of the decedent; in the other conclusions concurred.

JOHNSON, J., having decided the cause below, did not participate.

DEED OF GIFT BY MAN ON EVE OF HIS MARRIAGE of all of his property to his children, executed after the agreement to marry, and kept secret from the intended wife until after the marriage, is fraudulent and void, so far as it deprives her of dower in the real estate conveyed by such deed; and a court of equity will declare the deed void to that extent, even in the lifetime of the husband: *Petty v. Petty*, 39 Am. Dec. 501. This subject is treated of at some length in the note to *Thayer v. Thayer*, Id. 218; see also *Ramsey v. Joyce*, 37 Id. 550; *Manes v. Durant*, 46 Id. 65.

HUSBAND MAY DISPOSE OF HIS PERSONAL ESTATE IN ANY MANNER he thinks proper in his own life-time, and thus cut off his widow from dower in such property, and a voluntary conveyance will be good against the claims of the widow: *Cameron v. Cameron*, 48 Am. Dec. 759. The principal case is cited in *Greiner v. Klien*, 28 Mich. 16, *arguendo*, where the court discuss the importance of the widow's right of dower.

SHERLOCK v. THAYER.

[4 MICHIGAN, 355.]

WHERE RENT IS PAYABLE AT STATED PERIODS IN ADVANCE, the lessee has the whole of the first day of that period in which to pay it.

ERROR to the circuit court. The opinion states the facts.

D. C. Holbrook, and Wilcox and Gray, for the plaintiff in error.

D. and S. A. and D. Goodwin, for the defendant in error.

By Court, MARTIN, J. The only question presented in this case is, What was the intention of the parties to the lease in question, expressed by the stipulation that the rent should be paid weekly in advance?

By the assent of counsel for both parties that the term commenced on Tuesday, the eleventh of April, an assent conformable to the now well-settled doctrine regarding computation of time, we are saved much trouble in the solution of this question.

The week, then, commencing on Tuesday, ended on the Monday night following; were the rent payable weekly, at the end of each week, rent, if not paid during Monday, would be in arrears on Tuesday morning, so that the landlord might re-enter, or maintain his action therefor. Such is the doctrine of *Donaldson v. Smith*, 1 Ashm. 197, cited by counsel for the plaintiff in error. But a different question is here presented. Admitting that the weekly term ended on Monday, when was payment to be made for the next week, within the meaning of the covenant to make the same in advance? As in the case of rent payable at the end of a term or specified period, as of a quarter, the rent would not be in arrear and due until the end of such term or quarter; so we apprehend, when it is payable at specified periods in advance, it cannot be said to be demandable until the commencement of the period covered by such rent. A covenant to pay in advance is performed by payment at the time the possession is taken and the time commences, and no rule of law requires such covenant to be executed before possession taken. In such cases possession and payment are concurrent acts; and the tenant, being in possession, is entitled to the weekly interval between payments, as well as his landlord to the weekly right to demand payment. The rent, then, in this case, could not have been demanded on Monday, for it was not then due, as the weekly term had not commenced; and if Thayer could pay it at any time on Tuesday, he had the whole of that day to pay it, as the law knows no division of a day: See *Lester v. Garland*, 15 Ves. 248, cited in note to *Ex parte Dean*, 2 Cow. 605.

The only case we have been able to find which bears directly upon the question before us is that of *Smith v. Sheppard*, 15 Pick. 147 [25 Am. Dec. 432], where it was held, on a covenant to pay rent quarterly in advance (the first day of the quarter falling on the first of October), that the lessee had the whole of that day in which to pay it. The principle settled by that case is that when rent is made payable quarterly, or at other stated intervals, in advance, the tenant has the whole of the first day of each succeeding quarter, or other interval of time, in which to make the payment. This rule is founded in reason and justice, is consistent with the rules of law in analogous cases, and with the common understanding and experience of men, and operates to place such a construction upon the covenant as will preserve the rights of both parties to it. Were there any doubt respecting the meaning of the words or intention of the parties, we should arrive at the same conclusion, by observing the well-settled canon of construction, that words are to be construed according to their legal sense or ordinary import, and if this be doubtful, the intention of the parties to the contract is to govern. If this intention is doubtful, such a construction is to be adopted, if the words will admit of it, as will save an estate, rather than create a forfeiture: *Digelow v. Willson*, 1 Pick. 485.

The judgment of the court below must be affirmed.

Present, MARTIN, GREEN, WING, PRATT, COPELAND. JOHNSON, and BACON, JJ.

DOUGLASS, J., did not participate, having decided the cause in the court below.

"TENANT HAS WHOLE OF DAY UPON WHICH RENT FALLS DUE in which to pay it, and it is not in arrears until after twelve o'clock at night of such day, although strictly it is due in the morning of the day fixed for payment:" Wood on Landlord and Tenant, 742.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

DODD v. BROTT.

[1 MINNESOTA, 270.]

DEBTOR WHO IN GOOD FAITH PAYS DEBT BEFORE NOTICE OF ASSIGNMENT THEREOF is not liable to pay it over again to his creditor's assignee. **GARNISHEE IS BOUND TO ANSWER** as to his indebtedness to the defendant named in the process, and such answer cannot, therefore, be regarded as merely voluntary.

ATTORNEY HAS NO LIEN UPON JUDGMENT FOR HIS COSTS, without notice of his claim therefor to the judgment debtor.

ASSIGNMENT BY JUDGMENT CREDITOR OF JUDGMENT TO ATTORNEY merges any statute lien for costs which the attorney may have had thereon.

APPEAL from an order setting aside an execution. The opinion states the case.

Emmett and Moss, for the appellant.

De Witt C. Cooley, for the respondent.

By Court, **SHERBURNE, J.** This is an appeal from an order of the district court, in the county of Ramsey, to satisfy a judgment which the plaintiff had recovered against the defendant. The facts are substantially as follows:

William R. Marshall and George Cady had each recovered a judgment against the plaintiff for a sum exceeding two hundred dollars. The plaintiff, about the same time, recovered judgment against the defendant for the sum of two hundred and twenty-two dollars and seventy-nine cents. On the twenty-second day of October, 1853, being a few days after the recovery of the judgments above mentioned, a garnishee process was served upon Brott, at the suit of Cady, to secure the judgment already referred

to in his favor, and on the tenth of November, 1853, Brott appeared and answered, and judgment was rendered against him for the sum of ninety-six dollars and fifty cents. On the sixth day of February, 1854, execution was issued upon the judgment of Cady against Brott, and upon the first day of April, 1854, the execution was returned satisfied, and the judgment was satisfied; the amount of the whole, with costs, being one hundred and four dollars and eighty cents. On the twenty-second day of October, 1853, affidavit was duly filed with the clerk of the district court for garnishee process for Marshall against Brott, on account of the indebtedness of Dodd. On the twenty-second day of March, 1854, Brott duly appeared and answered, and on the twenty-seventh day of April, 1854, judgment was entered against him as garnishee of Dodd for the sum of one hundred and thirty-three dollars and thirty-one cents, and on the same day, as appears by the receipt of Marshall, said Brott paid to him on the judgment against said Dodd the sum of one hundred and twenty-four dollars and sixty-one cents. On the seventeenth day of January, 1854, execution was issued upon the judgment of Dodd against Brott. The execution was subsequently set aside, and the judgment upon which it was issued satisfied by order of the court. From this order the plaintiff appealed.

The objection to the order is, that prior to the time when Brott appeared and answered as garnishee in the causes above referred to, the judgment of Dodd against Brott had been duly assigned to Emmett & Moss. Of this assignment, however, Brott had no notice. The simple question arises, whether a debtor who pays a debt in good faith to his creditor can be made liable to pay it a second time to his creditor's assignee. If such a rule of law existed, I should not for a moment feel bound to follow it. It is repugnant to common sense and every principle of justice. But no such idea can be supported by authority. I have not looked into all the cases cited by the plaintiff's counsel, but that upon which he seemed to rely most, *Robinson v. Weeks*, 6 How. Pr. 161, is not in point. That was the case of a voluntary payment by a creditor, and the court bases the decision expressly upon that ground. The payment in this cause was by a judgment of the court. The argument of the counsel that the defendant answered voluntarily has no force whatever. He answered, so far as we know, as he was bound to do in the ordinary course of judicial proceedings. It is absurd to say that he could not properly answer at that time that he was indebted to Dodd, for the reason that Dodd had assigned the judgment,

because the assignees had not taken the precaution to give notice to Brott. He was called into court to testify whether he was or was not indebted to Dodd. There was but one answer which he could make truly, and that was that he was so indebted. Upon that answer, judgment was rendered against him necessarily, and that judgment he satisfied, by which he paid the plaintiff's debt. It is the unanimous opinion of the court that the order of the court below was properly granted.

It has been urged that although the assignment may be ineffectual for want of notice to Brott, still the attorneys for the plaintiff had a lien upon the judgment for the amount of costs. There are two reasons fatal to this position. The first is, the statute does not admit of this construction. The grammatical arrangement of the section and its punctuation leave no doubt whatever that notice to the debtor, in order to effect a lien upon the judgment, is necessary, as well when the attorney claims a lien upon the costs as when they claim it upon a portion of the judgment by virtue of a stipulation or agreement. The court are also of the opinion that even if the construction contended for by the plaintiff's counsel was correct, still the minor lien of the attorney was merged in the specific contract of assignment. I do not feel clear in my own mind as to the correctness of this position, and refer to it rather as the opinion of the court than my own.

The proceedings of the court below must be affirmed.

DEBTOR IS NOT AFFECTED BY ASSIGNMENT OF HIS CREDITOR'S CLAIM until he has notice thereof: See *Walters v. Washington Ins. Co.*, 63 Am. Dec. 451, note 456, where other cases are collected.

RIGHTS OF GARNISHEE: See *Walters v. Washington Ins. Co.*, 63 Am. Dec. 451, note 457, where other cases are collected.

ATTORNEY'S LIEN UPON JUDGMENT: See *Hobson v. Watson*, 56 Am. Dec. 632; *Andrews v. Morse*, 31 Id. 752, note 755, where this subject is discussed at length.

DUFOLT v. GORMAN.

[1 MINNESOTA, 301.]

GRANTING OF NEW TRIAL BY DISTRICT COURT IS MATTER OF DISCRETION, and not subject to review by the supreme court.

OBJECTION TO ADMISSION OF TESTIMONY CANNOT BE MADE FOR FIRST TIME in the appellate court.

CARRIER CANNOT ACQUIRE LIEN ON PROPERTY OF UNITED STATES GOVERNMENT for his services in transporting such property.

VERBAL PROMISE TO PAY DEBT OF ANOTHER IF HE DOES NOT PAY It is not an original undertaking, but a collateral one, within the statute of frauds.

ACTION to recover for the transportation of certain goods. From the finding of facts by the court on the second trial, it appears that one Fairbanks procured the plaintiff to carry the goods, which belonged to the government of the United States, to the store of one Fuller in St. Paul. Fuller refused to pay for the transportation of the goods, and the plaintiff refused to deliver them. The defendant thereupon verbally told the plaintiff to deliver the goods to Fuller, and if Fuller did not pay for the transportation, he, the defendant, would. The other facts are stated in the opinion.

Hollinshead and Becker, for the appellant.

Ames and Van Ellen, for the respondent.

By Court, **SHERBURN, J.** This action was brought by the plaintiff to recover a sum of money which he alleged to be due to him for hauling a quantity of goods from Watab in this territory to the city of St. Paul. The action was tried before a jury, and verdict rendered for the plaintiff. The verdict was set aside by the presiding judge and a new trial granted. The cause was again tried by the court by consent of parties, and a verdict rendered for the defendant. It now comes before this court by appeal from the district court.

Among a great number of causes stated by the plaintiff's counsel why the judgment below should be reversed, the first twelve go to alleged errors of the district court in granting a new trial. This has always been held a matter of discretion, and the order of the court below not subject to review. It has been so held by this court in a case not now reported.

The remaining points, from thirteen to nineteen inclusive, go to the finding of the district court at the last trial. The first objection which it is necessary to notice is that the court erred in finding that the goods transported by the plaintiff were of the property of the United States, because that question was not put in issue by the pleadings. This cause was twice tried in the district court, and in both instances the question of property in the goods was made, and testimony introduced relating to it without objection. This appears presumptively from the record. The objection appears for the first time in this court. The objection comes too late: See *Northrup v. Jackson*, 13 Wend. 85; *Whiting v. Cochran*, 9 Mass. 532; *Johnson v. Shed*, 21 Pick. 225.

The testimony went to show a want of consideration for the promise, and it is unnecessary now to inquire whether it should have been excluded if objected to or not, for having been introduced by tacit consent of the plaintiff, he has waived the error, if error it was.

The fact having been found that the goods transported by the plaintiff belonged to the United States, a question can hardly arise as to whether the plaintiff acquired a lien upon them to the amount of his services in transporting them. Individuals obtain no lien upon property of the government as security for their services. Such a power might often subject the operations of the government to the wishes and caprice of common carriers. The authorities cited do not support the position, and it requires no argument to prove that it cannot be supported.

The plaintiff having no lien upon the property, then, there was no consideration for the promise, and it was therefore void. But a question arises as to whether the promise was not void, admitting that there was a good consideration. The defendant had a legal claim for his services, either against Fuller or Fairbanks. The defendant directed the plaintiff verbally to deliver the goods to Fuller, and if he did not pay for the transportation the defendant would. The plaintiff contends that this contract or promise does not, upon the facts stated, come within the statute of frauds; and whether it does or does not is the question to be considered. It was a promise to pay the debt of Fairbanks or Fuller if Fuller did not pay it. The original debt was not discharged, and even now remains in force, unless it has been paid. The promise was not absolute, but conditional; it was not an original undertaking, but a collateral one. It was made to pay a subsisting debt due from a third party to the plaintiff. Such a promise is void, unless in writing, stating both the promise and consideration. I have examined the cases cited by the counsel for the plaintiff, but they fail to sustain his position.

It is difficult to reconcile all the decisions upon the question, and quite as much so to establish any uniform rule by which all cases may be governed hereafter; but no instance has been shown where a mere verbal, collateral promise to pay the debt of another was held binding, except where the original debt was discharged, or the amount was placed in the hands of the promisor by which it might be discharged. Such cases have been held to be original undertakings upon a new consideration, and therefore not within the statute: See *Farley v. Cleveland*, 4

Cow. 432, and cases cited. But in the case before us it cannot be contended that the defendant received any benefit from a discharge of the lien, if the plaintiff had any to discharge. The most which can be said is, that the plaintiff parted with a right which was of some value to him, although the defendant was not benefited. Such a consideration may be good if expressed in writing, but not otherwise.

The case of *Nelson v. Boynton*, 3 Met. 396 [37 Am. Dec. 148], is in point. The plaintiff had secured a demand which he held against a third person, by an attachment of his property. The defendant made an absolute promise to the plaintiff to pay the debt, in consideration that the plaintiff would release the property from attachment. This was done; but the court held, in an action upon the promise, that it was within the statute, and void.

See also *Jones v. Cooper*, Cowp. 227; *Jackson v. Rayner*, 12 Johns. 291; *Simpson v. Patten*, 4 Id. 422, for a very clear and elaborate view of the subject; see also *Farley v. Cleveland*, 4 Cow. 432, before cited.

Judgment below affirmed. _____

OBJECTION NOT RAISED IN LOWER COURT WILL NOT BE REGARDED ON APPEAL: See *Santo v. State*, 63 Am. Dec. 487, note 520, where other cases are collected.

CARRIER'S LIEN: See *Robinson v. Baker*, 51 Am. Dec. 54, note 58, where other cases are collected.

AGREEMENT TO PAY DEBT OF ANOTHER IS WITHIN STATUTE OF FRAUDS: See *Moses v. Norton*, 58 Am. Dec. 738; *Taylor v. Drake*, 53 Id. 680, note 682, where other cases are collected.

CASES
IN THE
HIGH COURT OF ERRORS AND APPEALS
OF
MISSISSIPPI.

JOHNSON v. BROOK.

[31 MISSISSIPPI, 17.]

DEED OF LAND SIGNED BY VENDOR AND KEPT IN HIS POSSESSION without delivery to the vendee, is not a sufficient memorandum of the contract to satisfy the statute of frauds.

WHERE HUSBAND AND WIFE AGREE TO CONVEY THEIR INTEREST in a tract of land, a deed thereof executed by the husband alone is not a complete memorandum of the contract, and is insufficient under the statute of frauds.

APPEAL from the district chancery court for the middle district. The opinion states the case.

N. G. and S. E. Nye, for the appellants.

George B. Wilkinson and R. B. Mayes, for the appellee.

By Court, **HANDY, J.** It appears that the appellant and his wife severally were the owners of two fifths of a tract of land, the residue of which was owned by the appellee; and that the appellee agreed with Johnson and wife to purchase their interests, and to pay for the same five dollars per acre, payable at a future day, and to pay annually ten per cent upon the amount until the principal should be paid, and the appellee took possession. In accordance with the agreement, Johnson had a deed of bargain and sale prepared, to be executed by himself and his wife, and it was signed and acknowledged by himself, and handed by him to the justice of the peace to obtain the signature and acknowledgment of his wife; but she refused to execute or acknowledge it, and it was returned by the officer

to Johnson. Under these circumstances, the vendor filed his bill in chancery for a specific performance of the contract, and a decree was rendered dismissing the bill as to the wife's interest, but ordering a specific performance of the contract as to that part of the land belonging to the husband.

The only question necessary to be considered is, whether the signing of the deed, under the circumstances, is a sufficient note or memorandum of the contract to satisfy the statute of frauds.

We have been able to find no case in which a writing signed by a party and kept in his possession, without delivery to the other party, has been held to be a compliance with the statute; and it would appear strange that such a paper could have that effect, when it is entirely within the power of the party to destroy it and prevent its being used as evidence of the contract. The cases cited to sustain this contract are not analogous to this. They are cases of memoranda made by auctioneers, and delivered to the purchaser, which are held to be sufficient, because the auctioneer is the agent of the vendor, who is bound by his acts; or cases of letters, or the like, written by the vendor, touching the purchase, and stating the particulars of it, and in the possession of the vendee. A case has been referred to in 6 Gratt. 78 [*Bowles v. Woodson*], as showing the sufficiency of the writing in this case. But we have not had access to the authority, and being unable to perceive the reason upon which it proceeds, we cannot give our assent to it. It appears to us that when the paper has never been delivered, and cannot be produced by the party seeking the benefit of it, it could have no more effect, with reference to the statute of frauds, than if it had never existed; because the vendee could not have the benefit of it without the aid of parol evidence to show its terms—and that would be to fall into the very mischief which the statute intended to prevent.

But there is another reason of much force why the deed in this case should not be considered as sufficient under the statute; and that is, that it does not appear that the contract, as intended between the parties, is evidenced by the deed, or that the deed was intended as a complete memorandum of the contract. It appears that the contract was entire—that Johnson and wife should convey their interests in the land by deed to the appellee. This contract was attempted to be performed by Johnson, and he signed the deed drawn up to be executed by himself and his wife; but she refused to execute it. His signature, therefore, was not of the contract he had made, but only

a part of it, and the memorandum was incomplete, and could not be evidence of the contract. The deed signed by him alone did not show the contract set up by the appellee, and cannot, therefore, be regarded as a complete memorandum of that contract.

We think, therefore, that the deed was insufficient as a memorandum under the statute of frauds, and that it was erroneous to decree a performance in virtue of it.

The decree is reversed and the bill dismissed.

MEMORANDUM REQUIRED BY STATUTE OF FRAUDS, REQUISITES OF: See *Doty v. Wilder*, 60 Am. Dec. 758, note 760; *James v. Patten*, 55 Id. 376, note 384; *Worrall v. Munn*, Id. 330, note 344; *Craig v. Godfrey*, 54 Id. 299, note 300; *Id. v. Stanton*, 40 Id. 698; *Pipkin v. James*, 34 Id. 652, note 655; *McCrea v. Purmort*, 30 Id. 103, note 116; *Atwood v. Cobb*, 28 Id. 657, note 662; *Russell v. Nicoll*, 20 Id. 670, note 673; *Peltier v. Collins*, Id. 711, note 715; *Meadows v. Meadows*, 15 Id. 645; *Davis v. Rowell*, 13 Id. 398, note, where this subject is discussed at length.

DEED EXECUTED BY DEFENDANT WAS HELD SUFFICIENT MEMORANDUM under the statute of frauds, though not delivered, in *Parrell v. McKinley*, 58 Am. Dec. 212. But in *Jelks v. Barrett*, 52 Miss. 324, it was held, citing the principal case, that no written instrument, however perfect, is sufficient in itself to convey the title to land so long as it remains in the exclusive possession of the vendor.

WORK v. HARPER.

[51 MISSISSIPPI, 107.]

WHERE JUDGMENT CREDITOR IS PREVENTED FROM ENFORCING HIS EXECUTION within the time prescribed by the statute of limitations, by an injunction granted at the instance of a mortgagee of the property levied on, the lien of whose mortgage was, at the time when the injunction issued, inferior to that of the judgment, such mortgagee cannot take advantage of the fact that the lien of the judgment is lost, and is not entitled to hold the property discharged of the lien of the judgment.

WHERE JOINT JUDGMENT IS RENDERED AGAINST PRINCIPAL AND SURETY, as joint makers of a promissory note, the judgment creditor is not required to file an affidavit of the insolvency of the principal before levying his execution on the property of the surety, unless the surety makes his affidavit of the fact of his suretyship.

APPEAL from the superior court of chancery. The facts appear from the opinion.

George S. Yerger, for the appellant.

D. Mayes, for the appellee.

By Court, **HANDY, J.** Two questions are presented in this case: 1. Whether, as the lien of the judgment enjoined is now barred by the statute of limitations, the appellant is not entitled to his injunction, and to have his title protected under his mortgage; 2. Whether the judgment of the appellee, being attempted to be enforced against a surety, and there being no affidavit filed as to the insolvency of the principal in the judgment, could be enforced against the property of the surety.

Upon the first point, it appears that the judgment of the appellee was rendered on the twenty-first of October, 1846, and on the sixteenth of January, 1847, the appellant's bill was filed, by which the appellee was enjoined from proceeding to execution upon his judgment, until such time as the lien of the judgment was barred by the statute of limitations. The appellant now seeks to avail himself of the expiration of the lien in order to protect his title under the mortgage. And the question is whether he is entitled to do so, under the sanction of a court of equity.

It is not, and cannot properly be, denied that the judgment was a valid lien upon the property at the time the execution was levied, and that it was superior to the claim of the appellant under the mortgage; that this just legal right has been prevented from being enforced until it is impaired or lost, and that by the litigation which has been commenced and carried on by the appellant. And when he has failed to establish the claim to protection upon which the litigation was commenced, and it appears that he has improperly prevented the judgment creditor from enforcing his execution, he cannot be permitted to take advantage of the accidental circumstance occasioned by himself, that the lien of the judgment is lost. The loss of the lien has been occasioned by himself, against the will of the appellee, and without any fault on his part; and upon no principle of equity could he be held to lose his right to the benefit of the appellant.

If the lien be lost, the appellant should not be permitted to take advantage of it; but, so far as the equity of the case depends upon this point, the injunction was properly dissolved, and the appellee left to his remedy upon the injunction bond for the injury which he had thereby sustained, and in consequence of the improper issuance of the injunction. This case is much stronger against the appellant than that of *Sugg v. Thrasher*, 30 Miss. 135.

Upon the second point, it appears by the exhibit of the original judgment, filed as a part of the record, that the suit was brought

against Young, as principal, and Barry and others as sureties, but the judgment was rendered against all the defendants as joint makers of the note sued upon.

It is now insisted that the execution could not be enforced against the surety without an affidavit being first made and filed among the papers of the cause, that the principal was insolvent; and it is said this case is embraced in the provisions of the act of 1837: Hutch. Code, 853.

We do not think this position tenable. The act of 1837 had reference to suits against makers and drawers of promissory notes and bills of exchange, and indorsers thereof, and to sureties on forthcoming bonds; in all of which the order and character of the liability appeared, either by an entry required by that act to be made upon the execution, or by the execution itself, which showed whether a party was principal or surety. In such cases, that statute required that before the sheriff should proceed to levy upon the property of an indorser or surety there should be an affidavit filed among the papers of the cause, stating the insolvency of the principal or maker. But it has been settled by this court that that act does not apply to joint makers of promissory notes against whom a joint judgment is rendered: *Walker v. Gilbert*, 13 Smed. & M. 693; and that, in order to render such an affidavit necessary, the surety should first make his affidavit of the fact of his suretyship. We think it clear that when the judgment is a joint one against several defendants the case falls under the provisions of the act of 1822: Hutch. Code, 558, sec. 47. But if the execution be against makers, drawers, and indorsers under the act of 1837, when the relative liabilities of the parties are required to be stated on the execution, or if the fact of suretyship appear by the face of the execution as upon a forthcoming bond, in such case there is a necessity for an affidavit in order to authorize the sheriff to proceed against the property of the indorser or surety.

But it is clear that this case, being a judgment against several joint makers of the promissory note, comes within the provision of the act of 1822, and not within the act of 1837; and although the judgment was in fact against principal and sureties, there was no law authorizing the clerk to make an entry of that fact upon the execution, and nothing by which the sheriff could properly take notice of the relations of the defendants in the judgment. It was therefore bound to proceed upon the execution as against several defendants equally and jointly liable, and to levy upon the property of any or all of them.

We think that the chancellor acted properly in dissolving the injunction; and the decree is affirmed.

LINE OF JUDGMENT, NOW AFFECTED BY INJUNCTION AGAINST EXEMPTION: See *Anderson v. Tydings*, 63 Am. Dec. 708, note 714, where other cases are collected. Enjoining judgment until the bar of the statute of limitations attaches is an unconscientious advantage which the debtor should not be permitted to take: *Marshall v. Minter*, 43 Miss. 678, citing the principal case.

THE PRINCIPAL CASE IS CITED IN *Wilkinson v. Flowers*, 37 Miss. 587, to the point that no statute of Mississippi requires that suit shall be brought against all of several joint makers of a note where some of them were sureties.

VICKSBURG & JACKSON R. R. CO. v. PATTON.

[31 MISSISSIPPI, 156.]

RAILROAD COMPANY HAS EXCLUSIVE RIGHT TO USE AND ENJOYMENT OF ITS TRACK, but this right is no greater than that which the owner of the land had before it was acquired by the company; and if such owner had no right, in carrying on his lawful business on his uninclosed land, to destroy his neighbor's beasts found upon it, neither has the railroad company, in conducting its business, any right to destroy such animals, unless the act was unavoidable, after the exercise of all due skill, prudence, and care by the company and its agents.

COMMON LAW OF ENGLAND IS LAW OF MISSISSIPPI ONLY SO FAR as it is adapted to our institutions and the circumstances of the people, and is not repealed by statutes, or varied by usages which by long custom have superseded it.

RULE OF COMMON LAW THAT OWNER OF CATTLE IS BOUND TO KEEP THEM WITHIN INCLOSURE is not applicable to the condition and circumstances of the people of Mississippi, and is not in force in that state.

IN MISSISSIPPI, OWNER OF CATTLE MAY PERMIT THEM TO GO AT LARGE in the neighboring range, and is not liable as a trespasser for the damage done by them to the premises of his neighbor, which are not inclosed by a lawful fence.

PROVISIONS OF STATUTES OF MISSISSIPPI ARE IRRECONCILABLE WITH COMMON-LAW RULE that owners of cattle are bound to keep them at home, and are made with reference to the contrary policy, which has long existed there.

IN MISSISSIPPI, ANIMALS AT LARGE UPON UNFENCED RAILROAD TRACK are not unlawfully there so as to justify the company in killing them, without using due care, prudence, and skill to avoid their destruction.

RAILROAD COMPANY IS BOUND TO KEEP ITS ROAD AND MACHINERY IN GOOD ORDER, and to have competent and trustworthy servants to manage its engines and cars, and if from its failure to do so the cattle of another, depasturing on its uninclosed track, are injured or killed, the company will be liable in damages to the owner.

NEGLIGENCE OR FAULT OF PLAINTIFF REMOTELY CONNECTED WITH INJURY will not prevent him from recovering damages therefor against a defend-

ant whose negligence has been the immediate and proximate cause of the injury.

EVIDENCE OF PREVIOUS HABITS AND CONDUCT OF PERSON IN CHARGE OF TRAIN at the time when an accident happened, by which injury was done to the plaintiff's cattle, is admissible in an action to recover for such injury, for the purpose of showing that his alleged misconduct at the time of the injury was in keeping with his general character.

EXEMPLARY DAMAGES MAY BE ASSESSED AGAINST RAILROAD COMPANY, in an action for killing cattle upon its track, where the evidence shows gross negligence, or a wanton and reckless disposition on the part of its agents to injure or destroy the plaintiff's property.

ERROR to the circuit court of Rankin county. The facts of the case are fully stated in the opinion. The following are the instructions given on behalf of the plaintiff below: "1. Under the laws of this state, the owner of uninclosed lands has not a right to kill or destroy the horses or mules of another found on such land; and railroad corporations in this state, unless under special provision of the charter conferring such right, are not exempt from this principle. 2. That corporations are liable for the tortious acts or negligence of their servants and agents in the same manner as individuals, unless released by their charters. 3. That the defendants, in running their locomotives and trains over their road, are bound to exercise such reasonable care and caution as may be necessary at any point of their road to prevent injury to the property of other persons; and if by reason of the want of such reasonable care and caution by defendants, or their agents or officers or servants, injury is inflicted by their trains upon the property of other persons, the defendants are liable in damages to the owner of such property so injured. 4. If they find from the evidence that at the time mentioned in the complaint the defendants were running their trains over the road without the officers and machinery, or either, usual and necessary to prevent collision and injury to persons or property of others, and that by reason of such want of officers and machinery, or either, and without any fault of plaintiff in the present case, the horses and mules mentioned in the complaint were run over and killed or rendered useless to the plaintiff by the defendants' train, they should find for the plaintiff. 5. If they find from the evidence that the plaintiff's property, mentioned in the complaint, was destroyed on defendants' railroad track in consequence of a want of reasonable care and diligence on the part of the defendants or their agents employed on the train at the time, and without any culpable neglect of the plaintiff directly causing the injury, they should find for the plaintiff.

6. That where there is mutual negligence between ' the plaintiff and defendant, the plaintiff may still recover if the negligence of the defendant was the direct cause of the injury complained of, and the negligence of the plaintiff but the remote cause of such injury; and if they find in this cause, from the evidence, that there was such mutual negligence, and that the negligence of the plaintiff was the remote, and that of the defendant the direct cause of the injury complained of, they should find for the plaintiff.' "

T. J. and F. A. R. Wharton, Freeman and Dix, and Yerger and Anderson, for the plaintiff in error.

George L. Potter, for the defendant in error.

By Court, HANDY, J. This action was brought by the defendant in error against the plaintiff in error, to recover damages occasioned by the locomotive and cars of the railroad running over and killing or wounding several horses and a mule belonging to the defendant in error; which injury is alleged to have been caused by the negligence, mismanagement, and improper conduct of the railroad company or its agents.

It appears by the evidence in the record that the injury was done in July, 1851, when the cars were on their usual morning trip from Brandon to Jackson; and that the slaves of Patton had ridden the horses to the place where they were at work in the woods, about a mile from the residence of Patton, and along a neighborhood road which crossed the track of the railroad, and which was the road used in going from Patton's residence to the place where his slaves were at work. The animals appeared to have been turned loose to pasture, their owner being in the habit of pasturing them upon uninclosed and uncultivated lands adjoining the railroad track, owned by other persons, and which had been used by the neighborhood generally for pasturage for a great number of years, without objection, such animals having been accustomed to run at large for pasture in the neighborhood since at least the year 1829. About the time the injury occurred one of the horses was seen, by a witness, standing on the railroad track where the neighborhood roads cross it, and the others were standing near the intersection of the two roads. From that point to the place where the horses were visible by persons on the cars coming from Brandon, it was not less than two hundred yards, and probably more; and from the same point to the culvert, where the collision took place, it was a further distance of about one hun-

dred and forty yards, the track being, for this latter distance, thickly set on both sides with bushes, and on an embankment four or five feet in height. On the morning of the occurrence the cars were running with unusual rapidity, such as had never been seen before by a witness who lived near the road. This witness was in full view of the cars and of the animals when the locomotive came within sight of the animals. The whistle was sounded before reaching the place of intersection where they were standing, but there was no change of speed perceived, nor any effort to stop the locomotive, by applying the brake or reversing the engine. When the locomotive approached within about one hundred yards of the place where the animals were standing, they turned and ran down the track until they reached the culvert, and being unable to go farther, or to escape from the track, they were there overtaken by the locomotive and mangled or killed; and the locomotive thrown from the track down the embankment, a distance of some thirty or forty feet.

The train at the time consisted of the locomotive and tender, a negro-car, a passenger-car, and five freight-cars; and the persons in charge of it were the engineer, the conductor, and a negro fireman. There was a grade on the track, from the culvert to the point where the horses were first visible to the engineer, at the rate of twenty-four feet to the mile, by measurement, and a moderate curve in the track.

It was proved by an experienced engineer that the engine used on this road at the time was in good condition; that such an engine, when running at the speed of twenty miles an hour, can be stopped in six hundred feet by applying the brakes, which should be in the front and rear of every car and worked by competent hands, and by reversing the engine in due time, and if there be sand-boxes to scatter sand upon the track, which is necessary in case it should be wet. He was of opinion that the engine could not have been stopped in six hundred feet upon this road, from his knowledge of its condition and the train usually attached to it; that if it was wet at the time, the difficulty of stopping would have been thereby increased; but that if everything had been in perfect order, six hundred feet is a sufficient distance for stopping the engine; that nine hundred feet would be necessary if the track was wet and there was a grade of even two feet; that brakes, with a sufficient number of brakemen, and sand-boxes filled with dry sand, are essential to the management of the train with safety.

There was testimony showing that there was much grass on the track at the time, and also testimony to the contrary; and it was shown that with the track in that condition, it would have been difficult to stop the locomotive; and if the track was in that state, that it was in a very bad condition.

There was also some testimony showing that the track was wet at the time; but there is a clear preponderance of evidence to show to the contrary, that the weather was clear, hot, and dry, and that there was no dew on the track at the time.

As to the character of the engineer, the testimony is conflicting. But while there is testimony to show that he was attentive and competent, the weight of evidence tends to show that he was not a careful and prudent man; that he was addicted to dissipation and drunkenness, and sometimes not sober when in the discharge of his duties as engineer; that it was often necessary to awake him in the morning for the cars after he had been drinking; that there was a constant sounding of the whistle on the morning of this occurrence, and before reaching the point where the animals were found, so much so as to attract the observation of the neighbors at the unusual rapidity and noise of the cars; and that the engineer was in the habit of sounding the whistle when there were no cattle on the track and when there was no occasion for it, and wantonly.

It was in proof by a witness, who was on the locomotive with the engineer at the time, that the engineer had been drinking liquor that morning, enough to feel it, but "was not drunk, but lively;" that when they first saw the animals, which was at a distance of about two hundred yards from the place where they were crossing the road, this witness remarked to the engineer that there was danger, and that he replied he did not care, let them get out of the way; that he did nothing to stop the train until the locomotive struck the first of the animals, and then the fireman sprang to the brake and witness helped him, but without effect; that about that time the engineer reversed the engine; that no order was given to apply the brake, the fireman acting of his own accord, and the witness to save himself.

The testimony of this witness is impeached by the production of a letter, testified by a witness to have been written at his instance, shortly after the occurrence, to the president of the railroad company, exculpating the engineer from all blame; which letter he denied in his deposition that he ever wrote or authorized to be written. But in many material respects his testimony was sustained by the other witnesses; and the

question of credibility was one which the jury had the right to determine, under all the circumstances.

It was further proved that the conductor, a lad of about seventeen years of age, was in the passenger-car when the collision took place, and had been there for some time reading a magazine or something of that kind, and paying no attention to the progress of the train; and that he knew nothing of the danger until he heard the sound of the whistle, when he looked out and saw the animals running; he sat down immediately and felt a sudden motion like that caused by reversing the engine. He then got out of the cars and found that the engine had run off the track, the negro-car across the track, and the passenger-car thrown nearly off the track, the animals lying dead or wounded upon the track. This witness proved that the cars started behind their usual time that morning from Brandon, and were running at the rate of eighteen or twenty miles an hour when the collision occurred.

It was further proved in behalf of the railroad company, by a witness who was not an engineer, but had been superintendent of this railroad for many years, that he was at the place on the day after the occurrence, and was of opinion that if the engine was running at its usual speed and there was dew and grass on the track it could not have been stopped, at the point where the accident occurred, in less than one thousand to fifteen hundred feet, with every appliance; that there was a curve and a grade descending towards the culvert, from Brandon, of thirty-two feet to the mile, as he judged by his eye; that there was much grass on the track, and he considered the road and cars and locomotive in good condition; that the grass would cause the wheels to slide, and render it difficult to stop the cars. There was not more than one brake to the train, no brakeman, and no sand-boxes, and the track was not fenced in or inclosed.

This appears to be the substance of the evidence, and it is here stated so much at length in order that some of the questions presented in the case, and depending upon it, may be properly comprehended.

The value of the property destroyed or injured was proved to be five hundred and fifty or six hundred dollars, and some further damage is shown to have resulted from the injury. The jury found a verdict of one thousand two hundred and eleven dollars and ninety cents, which exceeded the value of the property and actual damage proved; and the defendant below moved for a new trial: 1. Because the verdict was con-

trary to law and evidence; and 2. Because the damages were excessive. This motion was overruled, and the case is brought here for alleged error in that, and in the ruling of the court upon the trial, to which exceptions were taken.

Several questions of great importance and of the gravest public interest are here presented for the first time for the determination of this court. Fortunately these questions, though new in this court, have engaged the attention of the most learned courts in this country and in England; and in the consideration of them, in addition to the aid of the able arguments of the counsel for the respective parties, we have had the benefit of numerous adjudications of other judicial tribunals, involving the same or similar questions. By such aids we are enabled to come to conclusions satisfactory to our mind upon a subject of such profound importance in its direct and collateral bearings, and will proceed to state the views we take of the various questions presented for decision.

It is insisted, in behalf of the railroad company, that by their charter they had the absolute and exclusive right to the land covered by their track, with the privilege of running their engines and cars at whatever times and at whatever speed they saw proper, without obstruction; that they were not required by their charter, nor by any other law, to fence their track; that the exclusive property in it being in the company, it was a wrong on the part of the owner of these animals to suffer them to be upon the track; that it was his duty to keep them within his own inclosure or upon his own premises, and that if injury occurred to them, in consequence of being suffered to go at large and where they might be upon the railroad track, and thereby interfere with the legal and proper business of the railroad, it was by the plaintiff's own wrong, for which he is entitled to no redress; that being on the road wrongfully, and in derogation of the lawful business of the company, they were not bound to pay any attention to them, and might lawfully run their engines and cars in their proper business, without regard to them, and without responsibility for their destruction.

The first point of inquiry, therefore, is, What are the rights and duties of the railroad company, in the use of their road, with reference to the rights of others?

It is certainly true that they have the absolute and exclusive right to run their engines and cars upon their track, in furtherance of the objects of their charter, without interference by others; and that no one else has any right whatever to the use

or occupancy of their track. But this right is to be exercised in subordination to the general laws and policy of the state, unless where the company is, expressly or by necessary implication, excepted from their operation. And while their duties to those immediately connected with them in the objects of their business are faithfully to be performed, the rights of others collaterally interested in their operations are not to be disregarded. The highest of these duties is that which arises from a proper regard for the safety of persons who intrust their lives to the care and skill which are bound to be employed in the use of vehicles of so much hazard and danger. In this respect, the law imposes upon such companies the greatest strictness in providing all things necessary to the safety of passengers which care, skill, and foresight require; and that their agents should be faithful and vigilant, and in all respects competent and trustworthy of the great responsibilities committed to them. Without an implied guaranty by such companies for fidelity in these respects, the dangerous power given to them could never have been granted.

The relations of the company with other persons growing out of the use of their franchise are also governed by the general rules of law, from which, for the most part, they are not exempted by their charter. Their right of exclusive use and enjoyment of their track confers no power to violate the rights of others with which the exercise of their right may come in conflict, but must be exercised so as not to injure the rights of others. It is no greater than the owner of the land in fee-simple had before it was acquired by the company; and if such owner had no right, in carrying on his lawful business upon his own uninclosed land, to destroy his neighbor's beasts found upon it, neither could this company, in conducting their business, justifiably destroy such animals, unless the act was unavoidable, after the exercise of all due skill, prudence, and care by the company and its agents. For the rights and powers of the original proprietor, with regard to the land, were at least as high as those of the railroad company, and the rights of the owner of the animals, whatever they were, were as much under the protection of the law as those of the company. The idea is wholly inadmissible that in giving the company the use of the land covered by their track, for the purpose of running their engines and cars, it was intended to confer upon the corporation privileges and immunities in the land which the original owner, who had the full and absolute dominion over the same

property, to all intents and purposes, did not possess; and it is manifest that, no immunity being provided in their charter, they hold the land subject to the laws and general policy of the state, with no power, as to the dominion over it, superior to that of the original proprietor.

Let us, then, test the rights and duties of the parties to this controversy by the same rules of law applicable to the relations of the proprietor of the land before it was granted to this company, and the owner of the animals, the subject of this suit.

Suppose such proprietor, not having inclosed his land, had had upon it works in which dangerous machinery was employed in carrying on his lawful business; or suppose he had had a railroad upon it, and in full operation, performing all the business of such a work for his individual benefit and profit, but with no safeguards to protect his works against injury from the cattle of his neighbors: what is the rule by which, under such circumstances, he must be governed in the use of his property in the way he had seen proper to use it, with reference to the encroachment of his neighbors' beasts upon his land, and their interference with his business? It is clear that there was no right in his neighbors to permit their cattle to encroach upon his property; but if they had a right to suffer their cattle to go at large in a neighboring range or common pasture, ordinary prudence would dictate that the proprietor of the land and works should take proper means, by fences or otherwise, to prevent intrusions which would in all probability be made by them upon his property, and to the injury of his business; and if he omitted to do so, and, without such precautions, continued to pursue his business, and use his property, regardless of the fact that the cattle were in the way, and without the necessary care and prudence to avoid injury to them at the time, and the cattle should be destroyed, he would be responsible, unless, under our laws, the cattle would be trespassers, and liable to be distrained damage-feasant.

The question, then, is, whether by our laws and policy, a man is compelled to keep up his cattle so as to prevent depredations upon his neighbor's unfenced and uninclosed premises; or whether a man is not justified in suffering his cattle to go at large in the range or common pasture, without liability to those on whose premises, not being lawfully fenced, they may go; and whether it is not required that the owner of lands, before he can justify an injury done to his neighbor's beasts, which have come upon his lands, must not show that the trespass was done, not-

withstanding he had such a fence as is required by law, or that the injury was unavoidable, and such as could not have been prevented by due care and prudence.

It is urged, in behalf of the railroad company, that by the rule of the common law the owner of cattle was bound to keep them within his own inclosure; that the owner of lands was not required to guard against their intrusion upon his premises, but that the owner of cattle was bound to prevent them from entering upon the premises of others, whether fenced or not; that this rule of the common law prevails here, and that it is unlawful to permit cattle to graze in a neighboring range or common, or uninclosed pasture, from which they may go upon the premises of individuals to their injury; and consequently, that the act of the plaintiff in permitting his animals to go at large, being unlawful, he is not entitled to any redress for their loss, which resulted from his own wrong.

These positions are sustained by decisions of the supreme courts of New York, Vermont, Pennsylvania, and Michigan, founded on the reason that the rule of the common law prevailed in those states, which compelled persons to keep their cattle off their neighbor's lands, and holding that that principle is applicable to cattle suffered to go at large, and found upon railroad tracks, where they were destroyed. On the contrary, a different rule is held in Connecticut, Illinois, Ohio, South Carolina, and Alabama: *Studwell v. Ritch*, 14 Conn. 293; *Seeley v. Peters*, 5 Gilm. 180; *Kerwhacker v. Cleveland R. R. Company*, 8 Ohio St. 172 [62 Am. Dec. 246]; *Tripp v. Hasell*, 1 Strobb. L. 176; *Nashville etc. R. R. v. Peacock*, 25 Ala. 230; and the rule of the common law is held not to prevail, because it is inapplicable to the condition and circumstances of the people of those states, and repugnant to the custom and understanding of the people, from their first settlement down to the present time.

It cannot be denied that the common law of England is the law of this state only so far as it is adapted to our institutions and the circumstances of the people, and it is not repealed by statutes, or varied by usages which by long custom have superseded it; and that where the reason of it ceases, the rule itself is inapplicable. In a densely populated country like England, with small farms and but few cattle, the reason of the rule that every man shall prevent his cattle from going at large is apparent; and the rule prevails because it is suited to the condition of that country. The policy of the common law, therefore, was that it was more convenient that a man should be bound to

fence his cattle in than that he shall fence his neighbors' out. The same reason may render it applicable in many of the states of this Union, and in those where this rule has been held to prevail.

But the circumstances of our people are widely different from those of such communities. This state is comparatively new, and, for the most part, sparsely populated, with large bodies of woodlands and prairies, which have never been inclosed, lying in the neighborhoods of the plantations of our citizens, and which, by common consent, have been understood, from the early settlement of the state, to be a common of pasture, or in the phrase of the people, "the range," to which large numbers of cattle, hogs, and other animals in the neighborhood, not of a dangerous or unlawful character, have been permitted to resort. These large numbers of cattle and other animals are necessary to the wants and business of the people, whose great interest is in agriculture; and the large and extensive tracts of land suitable for the pasture of stock are most generally not required by the owner for his exclusive use. If so required, no one questions his right to fence them in and to appropriate them accordingly. But until he does so, by the universal understanding and usage of the people they are regarded as commons of pasture for the range of cattle and other stock of the neighborhood.

This policy is sanctioned by strong reasons of public convenience, growing out of the condition of the people. The greater part of the lands of the state have been comparatively but recently brought into cultivation. When purchased and taken possession of by their owners, they were wild. The timber had to be cleared, buildings erected, and as much land as could be brought into speedy cultivation. The settler had but little time to inclose his lands, and therefore he made inclosures only as his necessities and convenience required. He turned his cattle into the range, because it was more convenient to do so than to build fences and keep them within his own inclosures. His neighbors did the same thing, and the practice became general, and thus the usage has established the general rule among the people that it is more convenient to make fences to keep the cattle of others out from lands not intended to be used for pasture than to fence their own cattle within their inclosures. And by this custom a large amount of pasture, which would otherwise be lost, becomes useful and valuable in rearing great numbers of cattle and stock of various kinds, contributing greatly to the convenience and emolument of our people. It is

also highly convenient in rendering a man safe in pasturing his own cattle on his own uninclosed lands, which he could not do with safety if the common-law rule prevailed; because his cattle, when pasturing upon his own unfenced lands, would be liable to intrude upon his neighbor, and be subjected to the common-law rule arising from the trespass. He would therefore be compelled to inclose his own pasture lands before he could safely use them as such; and such a necessity in the condition of the lands of this state would be a great public grievance.

For these considerations, the custom has grown up among the people, and is well settled by universal acception, that a man is entitled to permit his cattle and other stock to go at large in the neighborhood range, and is not liable as a trespasser for the damage done by them to the premises of his neighbor, which are not inclosed by a lawful fence. This being the condition of the people from the first settlement of the state, and the same reasons of convenience still prevailing, it is manifest that the rule of the common law is wholly unsuited to our circumstances, and upon well-settled doctrine cannot be held to be applicable here.

If there could be a reasonable doubt upon this point, it must be removed by the provisions of our statutes. These provisions are utterly irreconcilable with the rule of the common law, and are made with reference to the contrary policy which has existed here.

The twelfth section of the act of 1822, Hutch. Code, 276, which was a re-enactment of an act passed in the early history of the state, provides that "it shall not be lawful for any person to drive any horses, mules, cattle, hogs, or sheep from the range to which the same may belong." The next section provides penalties for the violation of that provision. The fourteenth section prohibits animals of a particular character from being suffered to run at large in the woods, or in any inclosed range. Other sections make it the duty of each owner of horses, or other stock, to have a brand and ear-mark, and to have the same recorded; the object of which was that the stock of each owner in the range might be known and designated. And the seventeenth section prohibits the owner from sending or permitting any slave or Indian to go "into any of the woods or ranges of this state," to mark or brand any cattle, etc.

These provisions clearly recognize the right of any owner of horses, cattle, or other stock to put them in the range, which means the unfenced woodlands or other pasture-lands in the neighborhood.

Again: the act of 1822, Hutch. Code, 278, 279, which is a transcript of the territorial act of 1807, provides that "if any horses, etc., shall break into any grounds inclosed with a strong and sound fence five feet high, well staked and ridered, or sufficiently locked, and so close that the beasts breaking into the same could not creep through, which shall be deemed a lawful fence," the owner shall be liable to the party injured for damages. This provision is altogether useless, if the owner was bound to keep his cattle within his own inclosure; for by that rule he was liable for damages to the party injured by the trespass of his cattle, whether his premises were fenced or not. But it is plain that it was the object of this statute to change the rule of the common law, and to provide that the party whose cattle should intrude upon the premises of another should not be liable for damages, unless the party injured kept a lawful fence. This intention clearly appears from the third section of the same act, which prohibits "any person injured for want of such sufficient fence," under a heavy penalty, from wounding or killing any horses, mules, or other stock trespassing upon their premises.

The policy upon which these enactments are founded, and the acts themselves, clearly establish two principles: 1. That the owner of cattle may rightfully suffer them to go at large for pasture upon the neighboring range; and 2. That the owner of lands is bound to keep them fenced with a lawful fence if he would prevent the intrusion of cattle upon them; and otherwise, that he cannot complain that the intrusion is unlawful. And it has been held by this court that under these provisions, when cattle break through an insufficient fence into the premises of a party, he has no right of action for damages, and cannot distrain damage-feasant, which were clear rights at the common law; thus conclusively settling that the rules of the common law are not in force here: *Dickson v. Parker*, 3 How. 220.

It is to be observed that the cases above adverted to, holding that cattle found upon a railroad track may lawfully be destroyed in the prosecution of the business of the company, are founded upon the reason that the owner was compelled by the rule of the common law to keep them up, and that it was by the violation of that common-law duty that the cattle were at large and upon the road; and therefore that the owner, having been guilty of a wrong, is entitled to no redress against the company. Having shown that this rule of the common law does not prevail here, the argument founded upon it fails; and the conclusion follows,

that the plaintiff cannot be considered as a wrong-doer in suffering his animals to go at large for pasture, and that the animals were not unlawfully on the railroad track so as to justify the company in destroying them, without using all due care, prudence, and skill to avoid their destruction.

But it is contended that the railroad company having the exclusive use of their track, the plaintiff's cattle were improperly there, interfering with the lawful business of the company, to the hazard of the lives of their passengers, and impeding the speed which, from the very nature of their business, they were authorized to use in running their engines upon their track, and therefore that the injury was done without wrong on the part of the company.

This position is met with so much clearness and force by the supreme court of Ohio, in the case above cited, as to justify our adoption of the views of the subject there taken. The court say: "The defendant's right to the exclusive and unmolested use of its railroad track is undeniable. And it must be conceded that the plaintiff had no right to have his hogs on the track, and that they were there improperly. But how came they there? If the plaintiff had placed them there, or knowing them to be there, had omitted to drive them off, he would have been, perhaps, precluded from all claim to compensation. But it would appear that, in the exercise of the ordinary privilege of allowing these animals to be at large, by the plaintiff, they accidentally, and without his knowledge, wandered upon the railroad track. The right of the defendant to the free, exclusive, and unmolested use of its railroad is nothing more than the right of every other land proprietor in the actual occupancy and use of his lands, and does not exempt it from the duty enjoined by law upon every person, so to use his own property as not to do any unnecessary and avoidable injury to another. Finding the animals upon the track, it was the right, and indeed the duty, of the agents of the company to drive them off, but not to injure or destroy them by unnecessary violence. The owner of a freehold estate in lands, inclosed by a lawful fence, has the right to expel trespassing animals which have broken through his inclosure; but in doing so he would become liable in damages to the owner of the animals if they be injured by the use of unnecessary and improper means, although the latter would be bound to make reparation for the injury done to the former by the trespassing animals. It is not pretended that the railroad of the defendant was under inclosure, through which the plaintiff's

creatures had broken. It is true, there is no law in Ohio requiring railroad companies to fence their roads; but when they leave their roads open and unfenced, they take the risk of intrusions from animals running at large, as do other proprietors who leave their lands uninclosed. If a farmer undertake to cultivate his ground in corn without inclosing it, he would doubtless be troubled by the destructive intrusions of cattle running at large; but without a sufficient fence he could not maintain an action against the owner of the animals for the trespass. . . . The defendant constructed its railroad with a knowledge that it was the common custom of the country to allow domestic animals to run at large upon the uninclosed grounds of the neighborhood; and without the precaution of inclosing its railroad, the company could not sustain an action against the owner of such animals at large as might happen to wander upon the track of the road. The owner of the animals, in allowing them to run at large, takes the risk of the loss or injury to them by unavoidable accident; and the company, in leaving its road unprotected by inclosure, runs the risk of the occasional intrusions of such animals upon its road, without any remedy against the owner."

It is a sound and revered maxim of the law, that though a man may do a lawful thing, yet if damage thereby befall another, he shall be answerable for it, if he could have avoided it: *Broom's Legal Maxims*, 275; *Aldridge v. Great Western Ry Co.*, 4 Scott N. R. 156. This principle is entirely at war with the doctrine apparently sanctioned by some of the cases cited in behalf of the plaintiff in error, that the nature of their business required them to use great speed, and therefore, that they were justified in running their engines, regardless of cattle upon the road, with whatever speed they might think fit, without liability to the owner of the cattle thereby destroyed. Such a doctrine is unfounded in sound law, and would be dangerous and mischievous in the extreme, both to the lives of passengers of the company, and to persons whose rights may be collaterally involved in their operations. For such a rule, while it would give to conductors and engineers upon such road a free license wantonly to destroy cattle which might casually be upon their track, and in any way impede their progress, would greatly endanger the safety of travelers on the road by subjecting their lives to the capricious exercise of this liberty by the agents of such companies. These mischiefs would almost necessarily result from such a principle, if sanctioned; and the consequence

would be that all confidence in such works would be destroyed; and instead of being sources of public convenience, as they would be under salutary restraints of law which bind the citizen, they would be converted into instruments of private oppression and public calamity.

Again: it is said that the destruction of the plaintiff's animals was in consequence of him suffering them to be in a situation exposed to destruction, and of which he was bound to take notice; and that the rule is, that where the injury has resulted from the fault or negligence of the plaintiff, or from the fault or negligence of both parties, without any intentional wrong on the part of the defendant, there can be no recovery.

It is already shown that it was not unlawful in the plaintiff to suffer his animals to go at large in the neighborhood of the railroad, and as that was the remote cause of the injury, it cannot be said to be a wrong or gross negligence. It is true, the highest degree of prudence might have induced him not to suffer his cattle to be at large near the track and exposed to its dangers. But was he bound to use such precaution? He is to be presumed to have acted with a knowledge of the relative legal rights and liabilities of himself and the company. In suffering his cattle to range, exposed to the dangers of the railroad, he subjected himself to the hazard of all that the company might legally do in destroying them, but to nothing further. And they were justified in destroying them only in the necessary prosecution of their business, and when the act should become unavoidable, after the use of such care, prudence, and skill as a discreet man would employ to prevent it. He had the right to act, and must be presumed to have acted, on this rule; and if he suffered by it, but without any violation of it by the company, he would be without redress. But he was not bound to lose his right to range his cattle near the railroad and keep them inclosed, upon the assumption that they would be illegally destroyed by the company if suffered to go at large near the road. He had as high a right to range his cattle in the neighborhood of the road as the company had to run its engines and cars along their track—a right prior in time to that of the company, and one equally entitled to be noticed and respected by the company. If the plaintiff was bound to respect their right to run their cars and engines by keeping his cattle inclosed, in order to prevent their exposure to the dangers of the road and damage to the company, by parity of reason was it the duty of the company to respect his prior right of range, by keeping fences to

protect their road from incursions of his cattle, and to save him from injury by their destruction. The road was under no legal obligation to fence its track, nor was the plaintiff bound by law to keep his animals inclosed in order to prevent their exposure to the dangers of the road; and so far the legal obligations are equal. But the same rule of prudence that would require the plaintiff to inclose his cattle in order to avoid the danger of destruction by the railroad would also demand of the company, as a matter of protection to its property and of safety to the lives of its passengers, to fence its track. If there is any difference in the degrees of duty, it would appear that the latter was much the higher and more imperative, and the delinquency on the part of the company in neglecting it would of course be greater.

It is therefore manifest that the injury cannot be ascribed to the fault or negligence of the plaintiff, in which the defendant is not inculpated. And the most favorable point of view in which it can be regarded for the defendant is, that both parties were mutually in fault, and both the immediate cause of the injury. In such a case, unless the injury be malicious and wanton, the party injured cannot maintain an action, because the injury has been caused by his own wrong.

But this rule is subject to several qualifications, which render it inapplicable to the facts of this case.

1. It does not apply where the party committing the injury might have avoided it by the use of common and ordinary caution; and this is the rule, even where the remote cause of the injury is the unlawful act of the party complaining. This is held by numerous authorities. In *Mayor of Colchester v. Brooke*, 7 Ad. & El., N. S., 339, 53 Eng. Com. L., the plaintiff had deposited and kept a bed of oysters in the channel of a navigable stream, thereby creating a public nuisance; yet the defendant was held liable for running his vessel upon the bed of oysters, greatly injuring them, there being room to pass in the stream without it, because the injury could have been avoided by the use of reasonable care and diligence. In *Bird v. Holbrook*, 4 Ring. 628, 13 Eng. Com. L. 667, the defendant had set a spring-gun upon his walled garden to protect his property from being stolen; and the plaintiff, in climbing over the wall in pursuit of a stray fowl, was shot by the gun; it was held that the plaintiff was entitled to recover damages, although he brought the injury upon himself by a trespass upon the defendant's inclosure. In the case of *Deane v. Clayton*, 7 Taunt. 489, 2 Eng. Com. L. 461.

it is said that the rule "that you shall do no more than the necessity of the case requires, when the excess may in any way be injurious to another, is a principle which pervades every part of the law of England, criminal as well as civil, and, indeed, belongs to all law that is founded on reason and natural equity." The same rule is held in *Lynch v. Nurdin*, 1 Ad. & El., N. S., 29, 41 Eng. Com. L. 422; *Butterfield v. Forrester*, 11 East, 60; *Vere v. Lord Cawdor*, Id. 568; *Vaughan v. Menlove*, 3 Bing. N. C. 468, 32 Eng. Com. L. 211; *New Haven Steamboat etc. Co. v. Vanderbilt*, 16 Conn. 420; *Beers v. Housatonic R. R. Co.*, 19 Id. 566; and is involved in *Dickson v. Parker*, 3 How. (Miss.) 219.

Another qualification to the general rule, that there is no liability upon the defendant when the plaintiff has contributed to the injury, exists when, though both parties be in fault, the defendant has been the immediate and proximate cause of the injury. This is well settled by authority: *Davies v. Mann*, 10 Mee. & W. 545; *Trow v. Vermont Central R. R. Co.*, 24 Vt. 494 [57 Am. Dec. 191], and cases there cited; *Kerwhacker v. Cleveland etc. R. R. Co.*, 3 Ohio State, 194 [62 Am. Dec. 246]; *Broom's Legal Maxims*, 283.

It may therefore be considered as settled law, that though there be negligence or fault on the part of the plaintiff remotely connected with the injury, yet if at the time the injury was done it might have been avoided by the exercise of reasonable care, prudence, and skill on the part of the defendant, the plaintiff may maintain his action for the injury.

It follows, from these views of the case, that the instructions granted on the trial in behalf of the plaintiff were correct; and that the second, third, fourth, fifth, sixth, seventh, eighth, tenth, fourteenth, and sixteenth instruction in behalf of the defendant were erroneously granted, and the thirteenth instruction is questionable. And though the verdict was contrary to the instructions given in behalf of the defendant, it should not for that reason be set aside; because those instructions were erroneous, and should not have been given.

We will next consider the objections taken to the admissibility of certain evidence in behalf of the plaintiff. This testimony tended to show that the engineer on duty at the time this injury was done had previously been in the habit of sounding the whistle when there was no occasion for it, to frighten animals and to annoy the neighbors on the road. There was testimony showing him to be a man of dissipated habits; and the object of the testimony objected to, with other evidence to the same point

not objected to, was to show his character to be that of a reckless and untrustworthy agent. It is not denied that it was competent to show the character of the agent, and his unfitness for the responsible trust reposed in him. It is the imperative duty of such companies to provide skillful, competent, and trustworthy agents, and they are responsible upon their failure to do so for the consequences of their neglect of duty: *Stokes v. Saltonstall*, 13 Pet. 181; *Philadelphia etc. R. R. Co. v. Derby*, 14 How. 468. Upon a question involving his character and fitness for his trust, and the consequent responsibility of the company for his delinquency in these respects, it is not only competent but necessary to inquire into his previous habits and conduct in order to show that the alleged misconduct at the time of the injury was in keeping with his general character. Frequently it may be out of the power of a party to show positively the reasons of the particular delinquency of such an agent; and in such cases it is proper and necessary to show his general character in order to explain his conduct at the time.

The counsel for the plaintiff in error place their objection on the ground that this testimony tended to create a prejudice against the company, and thereby increase the damage. This may be true, though it does not appear to have been offered for that purpose; but if the testimony was competent to show that the company had employed a reckless and incompetent engineer, as it clearly was, that being a material point involved in the suit, it cannot be said that it should have been excluded. Being competent upon the issue, it is not to be presumed that it was perverted to an improper purpose before the jury.

The last objection urged against the judgment is, that the damages assessed by the jury were excessive. The amount of the verdict considerably exceeded the value of the animals actually proved, though there was evidence which might have justified the jury in somewhat exceeding that value. But it is plain that the jury gave exemplary damages, in some amount; and the question is, whether the case justified a verdict of that character.

The evidence was sufficient to justify the jury in believing that the railroad track was in an improper condition and unfit for the exigencies which may often arise in running such dangerous engines, being covered with grass, so as to prevent their prompt stoppage when necessary; that the cars were not supplied with the brakes and fixtures necessary to their safe running and speedy stoppage; and the injury here complained of is excused on these grounds: that the conductor was a lad of seven-

teen years of age, and giving no attention to his duties when the collision took place; that the engineer was a man of intemperate habits, reckless, and unfit for the responsible trust confided to him; that either by his wanton conduct or by the improper manner in which the cars were furnished with the necessary appliances for prompt stopping (either or both of which the jury had the right to believe from the evidence), the locomotive was not stopped, as it could and ought to have been, on a properly fitted and well-conducted railroad; that no proper exertion was made to stop the locomotive in time to avoid the injury, and that the engineer appeared reckless of the stock. No fault is imputed to the plaintiff, except that he did not keep his stock from the track, where they casually were without his knowledge.

Upon the evidence conducing to show this state of things, the court, by the consent of both parties, instructed the jury as follows: "Every man, in the management of his own affairs, shall so conduct them as not to injure others; this duty was a mutual one, binding alike on the plaintiff and defendants; and if the plaintiff has failed to observe this duty, and the defendants be guilty of a like breach, the plaintiff has no right to complain, and cannot recover, unless, notwithstanding the conduct of the plaintiff, the injury would not have happened had it not been for the wanton and willful negligence and misconduct of the defendants."

The question of gross negligence and wanton misconduct was thus fully presented to the consideration of the jury. Let us see what are the rules of law governing the conduct of the defendants in the prosecution of their business.

In the first place, the company is responsible for the tortious acts of its agent, whether the act was one of omission or commission, whether negligent, fraudulent, or deceitful: *Philadelphia & Reading R. R. Co. v. Derby*, 14 How. 468. And the same doctrine is held by the same court, in *Stokes v. Saltonstall*, 13 Pet. 181, and is applied to an incompetent or careless agent: *Cleveland etc. R. R. Co. v. Keary*, 3 Ohio St. 201.

In the case first cited, the supreme court of the United States say, in a case involving the liability of a railroad for an injury by the neglect of their agent: "Where carriers undertake to carry persons by the powerful and dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal

safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of gross:" *Philadelphia & Reading R. R. Co. v. Derby, supra.* And again: "Nothing but the most stringent enforcement of discipline, and the most exact and perfect obedience to every rule and order emanating from a superior, can insure safety to life and property. The intrusting such a powerful and dangerous engine as a locomotive to one who will not submit to control and render implicit obedience to orders is itself an act of negligence, the *causa causans* of the mischief. . . . Any relaxation of the stringent policy and principles of the law affecting such cases would be highly detrimental to the public safety:" *Philadelphia & Reading R. R. Co. v. Derby, supra.*

Again: it was the duty of the company to provide engines properly constructed and in good order, with suitable fixtures for preventing injuries likely to occur from the nature of their business; and to use "such care and diligence in using their locomotive upon the road as would be exercised by a skillful, prudent, and discreet person, having a proper desire to avoid injury to property along the road:" *Baltimore & Susquehanna R. R. Co. v. Woodruff*, 4 Md. 257; to provide a safe track, a safe engine and cars, and a suitable number of competent and faithful men to carry on the work: *Hegeman v. Western R. R. Co.*, 16 Barb. 356; *Mayor etc. of N. Y. v. Bailey*, 2 Denio, 441; *Cleveland etc. R. R. Co. v. Keary*, 3 Ohio St. 206; *Bradley v. Boston etc. R. R.*, 2 Cush. 539.

Again: it is a well-settled rule of law, and highly applicable to engines and locomotives on railroads, that persons having charge of instruments of great danger are bound to manage them with the utmost care: *Dixon v. Bell*, 5 Mau. & Sel. 198; *Lynch v. Nurdin*, 1 Ad. & El., N. S., 29, 41 Eng. Com. L. 422. It is well said by the supreme court of Ohio that "no one has the right to put in operation forces calculated to endanger life and property without placing them under the control of a competent and ever-active superintending intelligence. Whether he undertakes it or procures another to represent him, the obligation remains the same, and a failure to comply with it in either case imposes the duty of making reparation for any injury that may ensue: *Cleveland etc. R. R. Co. v. Keary, supra.* And in this, as in all other cases of agency, the rule is, that "the principal holds out his agent as competent and fit to be trusted, and thereby he, in effect, warrants his fidelity and good conduct in

all matters within the scope of the agency:" Story on Agency, 452.

The question of gross negligence or wanton mischief was distinctly submitted to the jury, and was a material part of the case; and whether we consider it with respect to the bad condition of the track and the absence of appliances and fence necessary for its safe operation, or the unfitness and recklessness of the engineer, it is plain that the jury were at liberty, from the evidence, to find that the injury was occasioned either by the gross neglect of the company, or the wanton mischief of the engineer. That was a question which they had the right to determine, and their verdict cannot be disturbed on that ground, when the evidence conduces to support it in any fair view in which it can be taken, especially when the testimony is conflicting and the credit of witnesses is involved. Under such circumstances, their finding settles the fact: *Philadelphia & Reading R. R. Co. v. Derby*, 14 How. 486; *Lynch v. Nurdin*, *supra*; *Beers v. Housatonic R. R. Co.*, 19 Conn. 566. Lord Denman says, in *Lynch v. Nurdin*, *supra*: "It is a matter strictly within the province of a jury deciding on the circumstances of each case."

And it is immaterial whether the jury thought there was gross neglect or willful mischief. The rules above stated apply equally to either state of the case, and would warrant the jury in finding exemplary damages, if the circumstances of neglect or aggravation tended to justify it, and they thought fit to award it. In the last case cited, Lord Denman says: "Between willful mischief and gross negligence the boundary line is hard to trace—I should rather say, impossible. The law runs them into each other; considering such a degree of negligence as some proof of malice:" *Lynch v. Nurdin*, *supra*. And upon the same principle the numerous cases, whether of gross negligence or wanton wrong, have proceeded, in which exemplary damages have been awarded. For it matters but little to a party injured whether the wrong be done with a malicious intent, or by gross violation or neglect of duty.

It must be taken, then, that the verdict of the jury settles the question that there were circumstances of aggravation tending to show gross negligence, or a wanton and reckless disposition to injure or destroy the plaintiff's property. And it is well settled that if the property was destroyed under such circumstances, exemplary damages may be awarded: *Sedgwick on Damages*, 42 et seq.; *Id.* 488, 489; 3 *Graham & Waterman on New Trials*, 1121 et seq., and cases there cited; and the damages allowed in this case do not appear to be enormous.

Upon a careful consideration of the whole case, in view of its great importance to the community, we are of opinion that the judgment is correct; and it is accordingly affirmed.

A reargument was asked on so much of the opinion as relates to vindictive damages, but it was refused.

RAILROAD COMPANY HAS RIGHT TO EXCLUSIVE USE OF LAND taken for its road: *Chicago & M. R. R. Co. v. Patchin*, 61 Am. Dec. 65, note 72, and cases there collected. But this right is no greater than the right of any other proprietor in the actual occupancy and use of his lands, and does not exempt the company from the duty enjoined by law upon every man so to use his own property as not to do any unnecessary and unavoidable injury to that of another: *Kerwhacker v. Cleveland etc. R. R. Co.*, 62 Id. 246.

COMMON-LAW RULE, REQUIRING OWNER OF CATTLE TO KEEP THEM AT HOME, has never been in force in Ohio, it being inapplicable to the condition of the people: *Kerwhacker v. Cleveland etc. R. R. Co.*, 62 Am. Dec. 246. The owner of cattle was in that state, as in Mississippi, permitted to allow his cattle to go at large in the neighboring range: Id. See also *Raiford v. Mississippi Cent. R. R. Co.*, 43 Miss. 239; *New Orleans etc. R. R. Co. v. Field*, 46 Id. 578; *M. & O. R. R. Co. v. Hudson*, 50 Id. 573, all citing the principal case.

LIABILITY OF RAILROAD COMPANY FOR KILLING CATTLE ON ITS TRACK: See *Norris v. Androscoggin R. R. Co.*, 63 Am. Dec. 621, note 625, where other cases are collected; *Kerwhacker v. Cleveland etc. R. R. Co.*, 62 Id. 246, note 270; *Chicago & M. R. R. Co. v. Patchin*, 61 Id. 65, note 72. A railroad company is only bound to use reasonable care to avoid the destruction of stock on its track: *Mississippi Cent. R. R. Co. v. Miller*, 40 Miss. 48, citing the principal case.

FENCING RAILROADS: See *Norris v. Androscoggin R. R. Co.*, 63 Am. Dec. 621, note 625; *Thorpe v. Rutland etc. R. R. Co.*, 62 Id. 625; *Kerwhacker v. Cleveland etc. R. R. Co.*, Id. 246, note 270, where other cases are collected. In *Memphis & O. R. R. Co. v. Orr*, 43 Miss. 287, it was held, citing the principal case, that in that state a railroad company is not bound to fence its road to prevent the intrusion of cattle on its track.

CONTRIBUTORY NEGLIGENCE AFFECTING RECOVERY: See *Galena etc. R. R. Co. v. Fay*, 63 Am. Dec. 323, note 333, where other cases are collected; *Pennsylvania R. R. Co. v. Aspell*, 62 Id. 323, note 327. If a passenger on a railroad train could, by the exercise of ordinary care, have avoided the injury, he cannot recover: *Southern R. R. Co. v. Kendrick*, 40 Miss. 386; *Vicksburg & M. R. R. Co. v. Wilkins*, 47 Id. 422, both citing the principal case. But to prevent the plaintiff's recovery, his negligence must proximately contribute to the injury. If the sole immediate cause of the injury was the defendant's negligence, the plaintiff can recover, notwithstanding previous negligence of his own: *Mississippi Cent. R. R. Co. v. Mason*, 51 Id. 244, citing the principal case.

LIABILITY OF RAILROAD COMPANY FOR NEGLIGENCE OF ITS SERVANTS: See *Black v. Carrollton R. R. Co.*, 63 Am. Dec. 586, note 589, where other cases are collected; *Pennsylvania R. R. Co. v. Aspell*, 62 Id. 323, note 327. Common carriers of passengers are bound to employ temperate and discreet agents and servants in the running of their trains: *New Orleans etc. R. R. Co. v. Allbritton*, 38 Miss. 278, citing the principal case.

EXEMPLARY DAMAGES, WHEN MAY BE ALLOWED: See *Black v. Carrollton R. R. Co.*, 63 Am. Dec. 586, note 589, where other cases are collected. Gross negligence or wanton mischief authorizes a jury to find exemplary damages: *Memphis & C. R. R. Co. v. Whitfield*, 44 Miss. 494; *City of Chicago v. Martin*, 49 Ill. 245, both citing the principal case. In actions of tort for personal grievances done to the plaintiff by fraud, gross negligence, or oppression, the jury may give such exemplary damages as they may think the wrong done justifies: *Heirn v. McCaughan*, 32 Miss. 49; *New Orleans etc. R. R. Co. v. Hurst*, 36 Id. 667, both citing the principal case.

FEARN v. SHIRLEY AND WIFE.

[31 MISSISSIPPI, 301.]

RIGHT OF FEMES COVERT AND OF INFANTS AS EQUITABLE OWNERS of property, the legal title to which is vested in trustees, is not barred by the failure of the trustees to institute a suit for its recovery until after the lapse of the period prescribed by the statute of limitations.

GENERAL DEMURRER TO BILL, SETTING UP STATUTE OF LIMITATIONS, ought not to be sustained where there are several complainants who are shown to be infants, and another whose disability is not distinctly shown.

APPEAL from the superior court of chancery. The opinion states the case.

Yerger and Bucks, and George L. Potter, for the appellants.

George S. Yerger, for the appellees.

By Court, **HANDY, J.** The material facts stated in the complainant's bill are, that in January, 1841, the complainant, Adeline Shirley, the wife of James Shirley, purchased from Leigh, Maddox & Co., and Samuel B. Marsh, the slaves in controversy, for her sole and separate use, and in behalf of herself and her children, which she then had or thereafter might have; and that Marsh and Leigh, Maddox & Co. conveyed the slaves to Shattuck and Caruthers, as trustees for Mrs. Shirley and her children, and others, upon the following trusts: that the trustees should permit Mrs. Shirley and her children, and James Shirley as their agent, to have the possession of the slaves, and other property mentioned in the deed, and to receive the hire and profits of the same to their own use, except so much thereof as should pay to Leigh, Maddox & Co., and to Marsh, the debts due them, and for which they purchased the property, as stated in the deed, which payments the trustees covenanted should be paid as specified in the deed; it was further stipulated by the trustees that the slaves, and other property mentioned in the

deed, should be kept together until the youngest of the future children of James and Adeline Shirley, if any, should arrive at the age of twenty-one years, and should there be no such future issue, then until the youngest child named in the deed should arrive at the age of twenty-one years; and then that the trustees should make an equal division of the slaves and their increase between Mrs. Shirley and her children.

In pursuance of the terms of this deed, the slaves remained in the possession of Mrs. Shirley, and were controlled by her husband, James Shirley, as her agent, but without any claim on his part, and this was continued until the year 1845, when they were levied upon under a judgment in favor of Martin, Pleasants & Co., against James Shirley, rendered in the circuit court of the United States, for this state, at Jackson, in May, 1837, and sold under execution thereon, and purchased by George Fearn, who then took them in possession, and now, by himself or through his agent, holds them under that purchase.

The bill also states that the lien of the judgment of Martin, Pleasants & Co. had expired when the sale was made, or, at all events, that it was inferior to that under which Leigh, Maddox & Co. and Marsh purchased, and from which complainant's title is derived; and that the lien of the judgment having ceased to exist when the property was levied upon under it, the judgment itself was extinguished by the discharge of James Shirley, as a certificated bankrupt under the act of congress.

The prayer is for a delivery of the slaves to the complainants, and for an account and decree for payment of the hire, etc. The defendants demurred to the bill, setting up the statute of limitations as a bar to the relief sought. The demurrer was overruled, and from that order this appeal is taken.

The only question necessary to be considered is, whether the possession of Fearn under his purchase is a bar to the recovery of the complainants. It appears by the bill that the levy upon the slaves was made in 1845, and that they were sold under the execution prior to February, 1846, and that Fearn has had them in his possession or under his control ever since, claiming them under his purchase. Whether the judgment under which he purchased was a lien or not, or whether it was in law extinguished or not by the discharge of Shirley as a bankrupt, is immaterial with reference to the defense which Fearn sets up as a bar to the complainant's recovery. The bill was filed in January, 1853, and it is clear that the adverse possession of Fearn for more than three years is a bar to the relief sought, unless

the coverture of Mrs. Shirley and the infancy of her children prevent the application of the bar to the case.

If the legal title had been in Mrs. Shirley and her children, and there had not been a party competent to assert and prosecute a claim to the property, there can be no doubt but that the disability of herself and of her children would have prevented the running of the statute. But it is insisted that the bill shows that the legal title was in the trustees, who are to be regarded as the owners, and were competent to sue, and having failed to do so, their remedy is lost against the purchaser, and also the right of recovery by the *cestui que trust*.

This rule is supported by many authorities; but a contrary doctrine has been held by this court, in the case of *Bacon v. Gray*, 23 Miss. 140. Judge Sharkey, in delivering the opinion of the court in that case, says that "the saving in favor of infants in this statute is general. It covers all rights of infants, and operates against all persons. At least, there is no exception in the statute itself; and to hold that time does create a bar against infants, in certain cases, is to interpolate on the statute." In answer to the objection that the infant's property is held by the trustee, whose duty it was to sue for it, and who was entirely capable of suing, he says: "An infant's property is always held by a trustee. If there should be no will or settlement, it goes first into the hands of the administrator, who may dispose of it illegally, or suffer it to be lost. In the next place, it goes into the hands of the guardian, who may also be negligent, or violate his trust. The infant cannot hold possession, or even sue for his property, without the aid of the guardian, nor can he make any valid contract in reference to it. If property be settled for his benefit by will or deed, a trustee must intervene. The law, in some way or other, forces the property into the hands of trustees; and one of the great objects of the saving was to protect infants against the mismanagement and negligence of those trustees. It must have been designed to prevent an injury from the act of any one, by affording a full opportunity to him to protect himself when his judgment should become sufficiently ripened to enable him to understand his rights." And the conclusion in that case was, that the infant's right of action did not accrue until he had arrived at full legal age, and that it was not barred until the lapse of three years thereafter.

We consider that decision as founded upon a just view of the object and policy of the saving of the rights of minors, contained in the statute; and the principle there stated is as appli-

cable to the rights of a *feme covert* as to those of infants. It is an adjudication upon the question, which no longer leaves it an open one in this court.

But it is objected that the bill does not show that James J. Shirley one of the *cestuis que trust*, and whose executrix is one of the complainants, was an infant, and that his disability would prevent the running of the statute of limitations as to him; and that if his right is barred by the statute, all the complainants are barred, because their claim is joint; and therefore that the demurrer should have been sustained and the bill dismissed.

The bill does not positively show that he was an infant at the time Fearn purchased the property, and if he had been the only complainant, it would have been necessary that the bill should show his disability, in order to show his right to recover. But where there are several complainants who are shown to be infants, and another whose disability is not distinctly shown, and the demurrer is general, without giving notice of the objection to the bill, on account of its insufficiency in its allegations, as to the disability of one of the complainants, it would not be proper to sustain the demurrer, and deprive the complainants of the right to amend, so as to show the disability of that complainant. Such a practice might operate much to the prejudice of the complainants, while if the defendant had given notice of the nature of the objection it might have been remedied by amendment. On the other hand, no injury could arise to the defendant by overruling his demurrer on this ground, because, if one of the complainants was not under disability, and the claim was barred as to him, this may be relied on by answer; and where the fact is established, the claim being joint, the bar must prevail as to all the complainants.

The decree overruling the demurrer is therefore affirmed, and the cause remanded, and the defendants required to answer within sixty days.

STATUTE OF LIMITATIONS IN CASES OF TRUSTS: See *Williams v. Otey*, 47 Am. Dec. 632, note 638, where other cases are collected. An action in favor of a ward is not barred by the failure of his guardian to sue: *Pearson v. McMillan*, 37 Miss. 609; *Anding v. Davis*, 38 Id. 598; *Eckford v. Evans*, 56 Id. 23, all citing the principal case.

THE PRINCIPAL CASE IS CITED in *Parmels v. McGinty*, 52 Miss. 481, to the point that the saving clause in the Mississippi statute includes the equitable right of those disabled to sue, as well as their legal rights.

WHITCOMB v. REID.

[31 MISSISSIPPI, 567.]

CHILDREN OF INTESTATE WHO LEAVES NO WIDOW ARE ENTITLED TO PROPERTY of their father which was exempt by law from execution in his life-time, under the Mississippi act of 1852.

DENTIST IS NOT "MECHANIC," NOR DOES HE CARRY ON "TRADE," within the meaning of a statute exempting from execution the "tools of a mechanic necessary for carrying on his trade."

APPEAL from the probate court of Madison county. The opinion states the case.

Lawson and Luckel, for the appellant.

Davis and Hill, for the appellee.

By Court, HANDY, J. The appellee, as the guardian of the minor children of Young W. Lewis, deceased, filed this petition in the probate court against the appellant, his administrator, praying the appointment of commissioners to set apart to the wards so much of the estate of their deceased father as was exempt from execution.

It appears that the mother of the children died before their father, who left no widow at his death, and that he was a practicing dentist, and died intestate.

On the hearing, the court appointed commissioners to set apart certain articles of personal property, including a set of dentist's instruments belonging to the deceased; and from this order the administrator appealed.

The first question presented is, whether the property of the deceased which is exempt by law from execution descends to the children where the father dies leaving no widow.

The act of October 20, 1852, provides that "all property, real, personal, or mixed, at present exempt from execution by virtue of any laws now in force, upon the death of the husband, dying intestate, [shall] descend in like manner as other property descends, according to the laws now in force, to the widow and children during widowhood, and afterwards to all the children alike, free from all contracts and liabilities of said decedent, or his widow during her life." *Id.*, p. 66.

It has been held by this court that the right to one year's provision out of the estate of the deceased, given by the act of 1839 to "the widow and children," is not dependent, as to the children, upon the life of the mother: *Edwards v. McGee*, 27 Miss. 92. And the act of 1852, above cited, still more clearly

confers the substantive right embraced in it upon the children. The provision is, that the property referred to shall descend "to the widow and children during widowhood, and afterwards to all children alike;" from which it is plain that all such property goes to the children upon the death or marriage of the widow. Both the terms of the act, and the reason upon which it is founded, show that the protection of the rights of the children, independently of those of the widow, was the subject of special consideration. For if the necessities of the children, with the care and protection of the mother, were the objects of special protection, it is manifest that they must have been much more the subjects of protection when deprived of their mother. And we think that they are entitled to the benefit of the provisions of the statute, though the father die leaving no widow.

The second question presented is, whether the instruments of a dentist are embraced in the language of the statute exempting from execution the "tools of a mechanic necessary for carrying on his trade."

We do not think that this provision can be extended to the description of instruments in question. A dentist cannot be properly denominated a "mechanic." It is true that the practice of his art requires the use of instruments for manual operation, and that much of it consists in manual operation; but it also involves a knowledge of the physiology of the teeth, which cannot be acquired but by a proper course of study; and this is taught by learned treatises upon the subject, and as a distinct, though limited, department of the medical art, in institutions established for the purpose. It requires both science and skill; and if such persons could be included in the denomination of "mechanics" because their pursuit required the use of mechanical instruments and skill in manual operation, the same reason would include general surgeons under the same denomination; because the practice of their profession depends, in a great degree, upon similar instruments and operative skill.

Nor could such a pursuit properly be said to be a trade. That term is defined to denote "the business or occupation which a person has learned, and which he carries on for procuring subsistence, or for profit—particularly a mechanical employment, distinguished from the liberal arts and learned professions, and from agriculture:" Webster's Dictionary. It is manifest that a pursuit requiring a correct knowledge of the anatomy and physiology of a part of the human body, as well as mechanical

skill in the use of the necessary instruments, could not be properly denominated a "trade."

The order of the probate court, so far as it respects the dental instruments, is therefore reversed, and the cause remanded for further proceedings in setting apart the other property embraced in the order.

"TOOLS OF TRADE," MEANING OF, IN EXEMPTION LAWS: See note to *Kilburn v. Deming*, 21 Am. Dec. 545, where this subject is discussed at length.

THE PRINCIPAL CASE IS CITED IN *Womack v. Boyd*, 31 Miss. 444. and in *Carpenter v. Brownlee*, 38 Id. 204, to the point that the statute giving property of a deceased person, exempt from execution, to the widow and children, gives it to the children if there be no widow.

CITY OF NATCHEZ v. VANDERVELDE.

[31 MISSISSIPPI, 706.]

PAROL AGREEMENT BETWEEN PARTIES TO ACTION OF EJECTMENT THAT JUDGMENT BE ENTERED therein for the plaintiff for the whole of the premises sued for, but that execution thereon be restricted to that part to which his title was conceded to extend, is not a contract for the sale or conveyance of land, and is not within the statute of frauds.

PAROL AGREEMENT BETWEEN PARTIES CLAIMING TITLE TO ADJOINING LANDS that each shall take and hold possession of specific parts, with possession delivered under such agreement, is in effect a settlement of the claims of the parties to the parts of the lands to which they are respectively entitled, and a surrender of all claim to any other part than that agreed to belong to each, and is not distinguishable in principle from a parol partition of lands between parties in possession and claiming title accompanied and followed by possession by each party of the part conceded to him. Such an agreement is valid and binding upon the parties, and is not within the statute of frauds.

WHERE COMPLAINANT'S REMEDY AT LAW HAS BECOME DOUBTFUL and embarrassed by the unconscionable conduct of the defendant, a court of equity will take jurisdiction of the cause.

WHERE PREMISES ARE SPECIFICALLY DESCRIBED IN JUDGMENT, and the plaintiff takes more under his *habere facias possessionem* than he is entitled to recover, the defendant cannot have restitution by motion in the court from which the writ issued.

APPEAL from the district chancery court at Natchez. The opinion states the case.

W. T. Martin and R. North, for the appellant.

J. Winchester, for the appellees.

By Court, **HANDY, J.** The material facts stated in the bill in this case are, in substance, that in the year 1837 the city of

Natchez purchased from Rutherford & McNeil certain real estate within its corporate limits, described as lots No. 4, and part of lots Nos. 1 and 3, in square No. 30, on the plat of the city, for the purpose of a burying-ground, and as such to be kept by the city, and the same was conveyed to them by deed, under which they took possession, and have continued in possession for the purpose specified, until dispossessed, as stated afterwards; that at the time of that purchase the Roman Catholic society had possession of lot No. 2, in square No. 30, under a deed from one Barland, made in the year 1802, that lot being described in the deed as "the lot in said town which has been used as a Roman Catholic burying-ground;" that the Catholic burying-ground never extended beyond lot No. 2, and at the date of the deed to the Roman Catholic society the square No. 30 had been divided into the lots above mentioned; that in the year 1841 the trustees of the Roman Catholic society, by deed, conveyed to Joseph Chanche, Roman Catholic bishop of Natchez, the same premises conveyed by the deed of Barland to them, described as "the Roman Catholic burying-ground;" that Chanche died in July, 1852, having by his will devised the premises to Anthony Blanc, who, in the year 1853, by deed, conveyed the same to James O. Vandervelde, bishop of Natchez, who took and has since held possession; that in the year 1843 Chanche instituted an action of ejectment against the city of Natchez, claiming title to the whole of block No. 30, and when that suit came on for trial it was admitted, on the part of the plaintiffs, that the Roman Catholic society, in whose behalf the action was brought, were not entitled, under the deed from Barland, to any part of lots Nos. 1, 3, and 4, or to more than lot No. 2, which admission was made on the testimony of certain-named witnesses who are since deceased, who testified that the Roman Catholic burying-ground was on lot No. 2; and it was also admitted by the defendants that their inclosure included part of lot No. 2, embracing sixty feet front, and running back one hundred and sixty feet to lot No. 4, and to that extent the plaintiffs were entitled to recover; that when the title of the parties to their respective parts of the property was first ascertained, it was proposed that a survey should be had to ascertain the respective parts, but this was abandoned upon the understanding between the parties that the plaintiffs would only demand or take possession of the part to which they were entitled, as above stated, and, acting in faith of that agreement, that the defendant made a written agreement, which was filed, stating that both par-

ties claimed title under Barland, and permitted a judgment to be rendered for the entire premises claimed in the declaration; that afterwards a survey of the premises was duly made, by the consent of the parties, in accordance with the previous agreement made when the judgment was rendered, by which it was found that a part of lot No. 2, being sixty feet front, and running back one hundred and sixty feet, was then, and at the time of the rendition of the judgment, within the inclosure of the defendants' lots; and in compliance with the previous agreement, the city gave up possession thereof to Chanche, in behalf of the plaintiff in the judgment, who soon afterwards erected a large edifice upon it, and he and his successor have since held it in possession, and put a division fence upon what was settled to be the boundary line between lot No. 2 and the adjoining lots of the same square; and in virtue of the same agreement, the city, some time after the survey, with the knowledge and acquiescence of Chanche, made costly improvements on lot No. 4, and the parts of lots Nos. 1 and 3, belonging to them.

The bill charges that the judgment would not have been rendered but with the understanding above stated as to the limited extent of the plaintiffs' claim, and that no further claim would be attempted to be enforced under the judgment; that in violation of that agreement, Chanche sued out a *scire facias* to revive the judgment, and to have it executed as to the residue of the lots embraced in its terms; and notwithstanding the effort of the city to resist it, upon the equitable grounds above stated, the judgment was revived, and execution has been issued, under which the city has been turned out of possession, and the possession delivered to Vandervelde, who has used it for improper purposes, and defaced it as a burying-ground, and is about to excavate and remove the earth, destroying the graves, and thereby causing a forfeiture of the estate of the city by putting an end to the purpose and use for which the premises were conveyed to them.

The prayer is for a specific performance of the agreement, for a restoration of the premises to the possession of the city, for an injunction against setting up the judgment in ejectment, or holding possession to the premises claimed by the complainant, and against damage to the premises, by removing the fences, earth, or otherwise interfering with the property.

The defendants filed a general demurrer to the bill, which was sustained; from which decree this appeal is taken. The first objection taken to the bill is that it seeks to enforce a specific per-

formance of a parol agreement concerning lands, which is void under the statute of frauds.

The substance of the agreement, as stated in the bill, is that upon the trial of the action of ejectment, which was for all the lots, it was ascertained by the plaintiffs, and admitted on their part, that they were only entitled to lot No. 2; and on the part of the appellants, it was admitted that the city had within its inclosure part of that lot, and thereupon it was agreed that the recovery should really be confined to the part of lot No. 2 in the possession of the appellants, and that the judgment, which in terms embraced all the lots, should not be enforced against lots Nos. 1, 3, and 4, which were then in the possession of the appellants, and under that understanding the judgment was rendered; and accordingly, that the Roman Catholic society, through its bishop, took possession of the part of lot No. 2 embraced in the agreement, without execution issued; and by the voluntary surrender of the appellants, and by consent, the appellants retained possession of the other lots.

We do not consider this agreement to be within the statute of frauds. It is not a contract for the sale or conveyance of lands, nor does it contemplate any act to be done by the plaintiffs in the action by way of assurance or conveyance of the title to the lots held by the city. It was simply an agreement as to the execution of the judgment, and as to the extent to which it should operate. No title to the city was intended to be derived from it; for under the written agreement made between the parties, they both claimed title to their respective parts of the land from Barland independently, neither claiming any right through or under the other. The judgment did not *ipso facto* vest a title in the plaintiffs, but only entitled them to recover possession of the premises to the extent to which it might rightfully operate. By its terms it covered all the lots; but by the agreement its operation was restricted within certain limits. The obvious purport of the agreement was not that it should entitle the defendant to the lots in her possession and claimed as her property, but that the plaintiffs should not attempt to enforce their execution. Its effect was entirely negative. The extent to which the plaintiffs should enforce the judgment was a very different question from their right and title to the lots claimed by the defendants, and which by the agreement was virtually admitted to be the property of the defendants; and that the judgment had relation to the possession of land does not render the agreement as to the extent to which it should be enforced the less a mere agreement

as to the operation of the judgment, or make it an agreement in relation to the sale or conveyance of lands within the statute of frauds.

Such being the true character of the agreement, the judgment was as much subject to its control as a judgment affecting the possession of personal property, and could no more be enforced in violation of an agreement upon which it was rendered than such a judgment.

But giving it all the force to which it is entitled, as an agreement directly affecting the title to lands, it is plain that it is but an agreement between parties claiming title to adjoining lands, that each should take and hold possession of specific parts, with possession delivered under that agreement. Such an agreement is neither within the letter nor spirit of our statute of frauds, which merely requires that "any contract for the sale of lands, tenements, or hereditaments, or the making of any lease thereof for a longer term than one year," shall be in writing. It is in effect a settlement of the claims of parties to the parts of the lands to which they were respectively entitled, and a surrender of all claim to any other part than that agreed to belong to each. There is no substantial difference in principle between such an agreement, when carried out by taking possession in severalty under it, and a parol partition of lands between parties in possession and claiming title, accompanied and followed by possession by each party of the part conceded to him; and such partitions are held to be valid and binding upon the parties: *Jackson v. Harder*, 4 Johns. 203 [4 Am. Dec. 262]; *Slize v. Derrick*, 2 Rich. L. 627; *Willey v. Bonney*, 31 Miss. 644. And upon the same principle, a parol agreement fixing boundaries, followed by actual possession under it, would not be within the statute, and would bind the parties. The agreement, when carried out by a division and possession in these cases, would conclude the parties; and the agreement in this case, followed by the possession taken and held by the parties in pursuance of it, cannot be distinguished from the principle of these cases.

The next objection taken to the bill is, that the appellants' remedy, if any, was at law by action of ejectment, or by motion in the circuit court for restitution of the possession of the lots of which the appellees had taken possession without right or title. It is insisted, in behalf of the appellants, that there was no clear, unembarrassed, and adequate remedy at law.

With respect to the remedy by a new action of ejectment, it is true that the recovery in the former action would not bar an

action by the appellants, to recover the possession of the lots from the appellees, to which they had no title. But according to the allegations of the bill, this remedy would be attended with difficulties, and would be of doubtful success.

The title of the appellants is alleged to be under a deed from Rutherford & McNeil, made in 1817, and possession held under it. Possession under that title for such a length of time would have been sufficient to prevent the plaintiffs recovering in the original action of ejectment. But it was admitted by the parties, by a written agreement made in that cause, and as the bill alleges, in order to effect the amicable adjustment which was intended to be made, that both parties claimed title under Barland; and it further appears that Barland conveyed to the plaintiffs, by deed dated in 1802, the lots which were used as a Roman Catholic burying-ground. Whether that deed embraced the lots claimed by the appellants depended upon the testimony of witnesses, who were introduced on the trial in the action of ejectment, as is alleged, and who proved that it only embraced lot No. 2. But these witnesses are since dead, and the appellants have lost the means of making that proof. If, upon the trial of an ejectment brought by the appellants against the appellees, the latter were to introduce this agreement in writing, that both parties claimed title from Barland, and show the deed from Barland to the appellees and possession by them under that deed of a part of the premises, claiming the whole, this evidence would tend strongly to destroy the appellants' claim under the deed of Rutherford and McNeil, and would probably defeat a recovery, unless it could be shown that the Roman Catholic burying-ground conveyed by the deed of Barland only embraced lot No. 2. And according to the allegations of the bill, that proof is lost or at least is rendered very doubtful by the death of the witnesses upon whose testimony it was shown on the former trial. These disadvantages under which the appellants labor have been occasioned, as is alleged, by the admissions and agreements made on the trial between the parties, and through confidence in the good faith of the plaintiffs in that suit, with a view to an amicable settlement of their respective rights, and after the claim of the appellants had been established. If the statements of the bill be true, the legal remedy is doubtful and embarrassed, and the appellants have been placed in that position by the violation of an agreement in the former suit, which was intended as a settlement of the respective rights of the parties. Under such circumstances they should not be

driven to a doubtful remedy, and have a right to insist in equity upon the agreement.

As to the remedy by motion in the circuit court for restitution, it is manifest that was not available in this case. Where the declaration and judgment are general, and not definite, in describing the premises, and the plaintiff takes under his *habere facias* more than he is entitled to recover, the defendant may have restitution by motion in the court from which the writ issued. But not so when the premises are specifically described in the judgment, as was the case here: *Adams on Ejectment*, 241; *Jackson v. Rathbone*, 3 Cow. 291.

But, moreover, no execution was issued to enforce the agreement, and it was voluntarily carried out by the parties. Afterwards, when the *scire facias* was issued to revive and enforce the judgment beyond the agreement, the appellants resisted it by the defenses set forth in this bill; but they were held to be insufficient, it is presumed, because they were equitable in their nature, and not allowable to annul a judgment in a court of law.

Finally, as to the general equity of the case, the bill shows, in effect, that the respective rights of the parties to the several lots were agreed to be settled amicably in the ejectment suit, and that, though a general judgment for all the lots was rendered for the plaintiffs, they were only entitled to lot No. 2, and that possession of that lot should be delivered up to them without execution; that possession was surrendered by the appellants accordingly, the other lots being retained—under the agreement and with the assent of the plaintiffs—by the appellants; that the appellants' right to the lots retained by them was established on the trial, but that the judgment was not rendered accordingly, because the plaintiffs in the action agreed that their rights should be amicably settled as agreed on, and the city relied upon the good faith of the plaintiffs, in consequence of which the means of establishing its rights are either lost or rendered doubtful, and the plaintiffs, after having obtained all that they were entitled to, and had agreed to receive, have availed themselves of the general terms of the judgment to deprive the appellants of their portion of the property, which they retained under the settlement made between the parties.

If these allegations be true, it is manifest that it is a case of unconscientious advantage, which a court of equity should redress. In equity, the agreement of the parties and their acts in carrying it out must be regarded, under the circumstances of the case, as not only an agreement that the judgment should not

be enforced against the lots claimed by the appellants, but as a settlement of their respective rights to the lots of which they had possession after the agreement was carried out. For the agreement, as stated, was to be carried out without legal process, and was actually carried out by amicable partition. Under such circumstances, the acts of the appellees are equivalent to a partition, and conclude them from any further claim upon the lots claimed by the appellants.

The decree must be reversed, the demurrer overruled, and the defendants below required to answer the bill within sixty days.

PAROL PARTITION OF LANDS, WHEN VALID: See *McMahan v. McMahan*, 53 Am. Dec. 481, note 486; *Lynch v. Baxter*, 51 Id. 735, note 748, where other cases are collected. A parol partition of land followed by occupancy, in pursuance of the parol agreement, is valid: *Pipes v. Buckner*, 51 Miss. 854, citing the principal case.

HEIRN v. McCAUGHAN.

[32 MISSISSIPPI, 17.]

DUTY IMPOSED UPON COMMON CARRIER TO STOP AT ANY PARTICULAR STATION, after having advertised to do so, was imposed upon him as a common carrier, and did not proceed from a special contract to transport any particular passenger.

WHERE COMMON CARRIER ADVERTISES TO STOP AT CERTAIN STATION, AND TAKE UP PASSENGERS, AND NEGLECTS TO DO SO, the courts are inclined to consider an action against him for his neglect as founded in tort, unless a special contract is very clearly shown by the declaration. The action must be regarded as in the nature of an action on the case for the violation of the duty of the carrier, arising from his engagement to the public. The character of the action must be determined by the nature of the grievance, rather than by the form of the declaration.

WHEN COMMON CARRIER ADVERTISES TO STOP AT CERTAIN STATION AND TAKE UP PASSENGERS, he is bound by the rules of the common law to perform his undertaking, and no consideration other than the general legal obligation resting upon him from the nature of his business need be shown by one who has been injured by his acts. Unless good and sufficient reason be shown, any individual injured by a violation of his obligations may maintain an action for the injury.

INSTRUCTION WHICH ASSUMES EXISTENCE OF FACT is not erroneous when that fact is clearly established by the evidence, where there is no testimony to disprove it, and where it was not contested at the trial in the court below.

ONE MEMBER OF PARTNERSHIP CANNOT BIND FIRM by an act clearly without the scope of the partnership business. But he has power to bind the firm in all parts of the business in which it is engaged, and in all transactions appertaining to its business. And in all transactions which from their nature appear to the world to be legitimately connected with the

business of the partnership, in which they are openly engaged, although in reality they exceed the terms of the partnership, one partner may bind the firm.

OBLIGATION OF CARRIER TO STOP AT STATION FOR PASSENGERS—EVIDENCE TO EXPLAIN LETTER INCURRING SUCH OBLIGATION.—A line of steamers conveyed the mails and passengers between two points. They occasionally stopped at intermediate stations, first giving notice of their intention so to do. The question was, whether the company were under a legal obligation to stop at a certain station at a specified time, and take on passengers. It was shown that the company wrote a letter to the postmaster at this station, telling him to have a mail ready at this time, as they were going to stop one of their boats there to receive the same. They also directed him in this letter "to advise all who might feel interested," of this fact. He posted the letter in a conspicuous place. *Held*, that the request above quoted extended to persons desiring to take passage upon the boat, as well as those interested in the mail, and that it was proper to introduce evidence outside of the letter for the purpose of showing this fact. It was proper to consider not only the letter making the appointment, but the circumstances under which it was written, and the business in which the company was engaged.

IT IS NO EXCUSE ON PART OF CARRIER OF MAILS AND PASSENGERS, WHO HAS FAILED TO KEEP HIS OBLIGATION to stop for passengers at a certain time and point, to say that had he done so he would have been unable to perform his contract to deliver the mails on time.

INSTRUCTION IS ERRONEOUS WHERE THERE IS NO EVIDENCE UPON WHICH IT COULD BE PROPERLY PREDICATED, as the only effect it could have would be to suggest to the jury facts which are not in evidence before them.

JURY MAY IN THEIR DISCRETION AWARD EXEMPLARY DAMAGES AGAINST COMMON CARRIER in an action founded upon tort against him, in neglecting to keep his obligation to stop at a certain station at a certain time, whereby plaintiff was deceived and injured.

IN ACTION FOR GENERAL DAMAGES ARISING DIRECTLY FROM GRIEVANCE COMPLAINED OF, and as the necessary effect of the wrong, the law presumes damages to have accrued from the wrong, and it is not necessary to state the particular circumstances of aggravation in the declaration. Consequently, in an action against a common carrier for a violation of his duty in not stopping at a station for passengers, plaintiff, who was injured thereby, may show in aggravation of his damage the delicate state of his health, whereby the wrongful act of the defendant operated with peculiar distress upon him, without alleging it in his declaration.

IN ACTION FOR DAMAGES WHICH DID NOT NECESSARILY ACCRUE FROM ACT COMPLAINED OF, and consequently are not implied by law, it is necessary that the declaration should state the special damage complained of in order to prevent surprise on the defendant.

LIABILITY OF PARTNER FOR TORT OF COPARTNER.—One partner is not chargeable with the tort of his copartner, done without his knowledge, when the wrongful act was wholly unconnected with the partnership business, but where it is connected with the business of the firm, and incident to it as the business is carried on, the tort of one partner is considered the joint and several tort of all, and the partner doing the act is considered as the agent of the other partners.

ERROR from the circuit court of Harrison county. The opinion states the facts.

D. Mayes and F. Anderson, for the plaintiff in error.

John Henderson, for the defendant in error.

By Court, HANDY, J. This case is composed of two suits, one brought by John J. McCaughan in his own right, and the other by John J. McCaughan and Maria, his wife, for grievances done to the wife; and being founded on the injuries done to the parties at the same time, they were consolidated and tried together. The material facts alleged in both complaints are the same, and in order to understand the nature of the case, it will be sufficient to state the allegations of the complaint in the suit of McCaughan and wife, which are as follows: "That the defendant below was a copartner with one Geddes and others in a steamboat company plying between New Orleans and Mobile, and in the waters of the southern sea-board of this state, engaged in the transportation of freight and passengers for hire, and of the United States mails as common carriers, to and from the cities above named, and the various towns on the Mississippi sea-coast, including the town of Pascagoula, deriving their patronage and profit from freight and passengers furnished by the public; that the company on the twentieth of December, 1853, published a special notice at Pascagoula to the public, that on the twenty-fourth day of that month they would cause one of their boats to stop at that point on her trip from New Orleans, for the purpose of taking freight and passengers thence to Mobile; that, acting upon said notice, the plaintiff's wife and himself went at the appointed time to the wharf, the usual place of landing of the boats of the company, at about eleven o'clock at night, and in time to take passage to Mobile in the boat, according to the advertisement, and remained there in waiting for the boat until day-break on the following morning, but the boat did not come, and the trip was lost to the plaintiff's wife, who was detained there for several days thereafter; that it was necessary that the parties should remain on the wharf watching for the boat during the night, in order to get passage, and that the wharf was a most inclement place during the night, which was unusually cold, and the situation exposed and comfortless, especially for the plaintiff's wife; that by reason of the exposure she suffered great pain and anguish and incurred much injury, her health and life being exposed to much peril and hazard. The complaint concludes in these words: "By all which means, caused

by the bad faith, neglect, and indifference of said steamboat company to keep and observe their promise to the plaintiffs, and to the public aforesaid, she hath suffered personal damage to the value of one thousand dollars, and to recover which is the subject of this suit."

The defendant below demurred to the complaint or declaration; and upon that, two objections are presented against the plaintiff's recovery, which first demand our consideration. The first of these is, that there was no direct promise made by the company or the defendant to the plaintiffs to stop their boat at Pascagoula at the time specified; that no consideration was paid to bind them to do so, nor were the plaintiffs under any obligation to take passage in the boat at the time; and as the obligation was not binding on both parties, that the company were at liberty to abandon their engagement to stop at that point at the time specified. The second is, that in the suit of McCaughan and wife, the action could not be maintained because it is one *ex contractu*, and in such cases the husband and wife can join only where there is an express promise, and she is the meritorious cause of the action.

These objections both proceed upon the assumption that the actions were founded on the special contract of the company with the plaintiffs; but we do not consider that a proper view of the nature of the actions. The substance of the complaint is, that the company, of which the defendant was a copartner, were common carriers of freight and passengers, and as such were engaged in running their boats from New Orleans to Mobile, and the intermediate points on the Mississippi sea-coast, including Pascagoula, and that they gave notice that they would stop at that point at a specified time in the course of their business, and thereby became bound to do so; and that the plaintiffs, relying on their compliance with their promise, attended, and were ready at the proper time and place to take passage, but the company failed to perform their duty, and the plaintiffs were unable to obtain passage, and sustained damage in consequence thereof. This shows nothing of a special contract between the plaintiffs and the company. The duty which it is alleged the company failed to perform was that imposed upon them as common carriers, and not one proceeding from a special contract to transport the plaintiffs from Pascagoula to Mobile. It was an obligation which the company owed as well to the public at large as to the plaintiffs, by reason of their general business as common carriers and transporters of passengers; and that obli-

gation was not changed from a general duty to a matter of special contract by the fact that the company gave notice that they would stop at Pascagoula at a specified time in the course of the regular business in which they were engaged, and in which the public were interested.

The character of the action must be determined by the nature of the grievance rather than by the form of the declaration; but in this case they both indicate that the action is founded on the violation of a general duty, and not on a breach of a special contract. And wherever the action, in cases of this kind, is against a common carrier, the courts are inclined to consider it as founded in tort, unless a special contract be very clearly shown by the declaration: *Collyer on Part.*, secs. 735, 736, 738; *Ansell v. Waterhouse*, 6 Mau. & Sel. 385; *Possi v. Shipton*, 8 Ad. & El. 963. It is manifest, therefore, that this action must be regarded as in the nature of an action on the case for the violation of the duty of the company arising from their engagements to the public. In such cases the carriers are bound by the rules of the common law to perform the work tendered them; and no consideration other than the general legal obligation resting upon them from the nature of their business need be shown by a party who has been injured by their acts of omission or commission, whether negligent, fraudulent, or deceitful: *Story on Bailm.*, secs. 508, 591; *Philadelphia etc. R. R. v. Derby*, 14 How. 486. Their business as common carriers charges them with duties to the public, which, when violated, entitle the parties aggrieved to an action for the tort which is wholly distinct from a matter of individual contract.

It is true that the carrier has the right to abandon his business as such whenever he sees fit to do so; but whilst he holds himself out to the public as in the prosecution of it, he should be ready and willing to perform the duties appertaining to it according to his undertaking; and in case of neglect, without some good and sufficient reason, any individual injured by a violation of his obligations may maintain an action for the injury: 2 Kent's Com. 598, 601; Bac. Abr., tit. Carriers, B. The objections to the complaint or declaration raised by the demurrer were therefore properly overruled.

We will proceed to consider next the questions raised upon the instructions granted in behalf of the plaintiffs, and upon those asked by the defendant and refused.

The first instruction excepted to is as follows: "That the written publication offered in evidence of the promise of the

mail-line company to send a boat into Pascagoula at the time therein referred to is an engagement or promise that the plaintiffs had the same right to rely on as if it had been an express engagement with the plaintiffs by name; provided they believed that said publication was intended as a notice to passengers, or to the public that passengers would be carried."

In order to judge of the propriety of this instruction, it is necessary to advert to so much of the evidence as relates to it.

It appears that the defendant and three other persons, Grant, Geddes, and Day, were copartners in running a line of steamboats from New Orleans to Mobile and certain points on the Mississippi sea-coast, carrying freight and passengers and the United States mail to and from the several points at which they touched; that during the winter season Pascagoula was not one of the points at which the boats of the line running to and from New Orleans and Mobile were advertised to stop at stated times for taking freight, passengers, and mails, the business of the company at that point being, for the most part, during the winter season performed by one of their boats called the Creole, which plied between that place and New Orleans; but that it was their custom to stop their boats running between New Orleans and Mobile at the places on the coast, upon giving notice by advertisement; that on the twenty-first of December, 1853, the postmaster at Pascagoula received from the office of the mail-line agency the following letter, which was brought by one of the boats of the company, and delivered by the mail-messenger from the boat:

"OFFICE OF THE MAIL-LINE AGENCY,
"NEW ORLEANS, Dec. 20, 1853.

"POSTMASTER, PASCAGOULA: *Dear Sir*—This is to advise you that the mail-boat hence for Mobile on Saturday next will stop at Pascagoula, instead of the steamer Creole. You will please have a mail in readiness for Mobile to go by said boat, and oblige, etc.

R. GEDDES, by ABRAMS.

"N. B. Advise all who may feel interested in the above."

Which letter was proved to be in the handwriting of Abrams, the confidential clerk of the company at New Orleans, Geddes being both agent and copartner; that the letter was posted up near the post-office door immediately after its reception, and was known to the citizens of the place and acted upon by some of them. It was further proved that notices of the voyages of the boats of the company were usually issued from the office of Geddes in New Orleans, and that Geddes stated that the Florida,

one of their boats, was to go to Pascagoula on the twenty-fourth of December, 1853; but that Grant, the captain of that boat, stated before he left New Orleans that he would not stop at Pascagoula that night, but would run according to the regular advertisement, and that Geddes had no right to engage the boat to go where she was not advertised to go; and that if there was any damage occasioned by the failure to stop in this case, Geddes ought to pay it. It further appears that the plaintiffs acted on information obtained at Pascagoula, that one of the boats would stop there on the night stated, the source of which was the letter to the postmaster, which was made public; and that the plaintiffs and several other persons remained on the wharf during the whole night exposed to severe cold and much suffering, waiting to take passage to Mobile, but that she passed by without stopping.

We will now examine such of the objections to the instruction as appear to us to have any force. And the first that we will notice is that the instruction assumes it as proved that the letter to the postmaster was the act of the company, and written by their authority, instead of submitting that question to be decided upon the facts of the case by the jury.

The evidence shows clearly that the letter was written by the clerk of the company, and was forwarded and delivered by one of their boats; that it was the practice with them for announcements of trips of their boats to be issued from their office, from which this letter was written, and that their agent and copartner acknowledged that their boat was to go to Pascagoula on the twenty-fourth of December, and that Grant, the captain, said before leaving New Orleans that he would not go there that night, and that if any damage was sustained by the failure, it should fall upon Geddes. This shows fully that the appointment and notice of the stopping of the boat at Pascagoula at the time specified were made and issued by the authority of Geddes, the copartner, and according to the practice of the office of the company in ordering their trips. And there is no evidence tending to show that the notice was not issued from the office of the company and by the direction or sanction of Geddes. Nor does that point appear to have been contested on the trial in the court below. There could therefore be no impropriety in treating the appointment and notice as the engagement of the company, provided Geddes was competent to charge his copartners by the act.

But it is insisted that though the letter was written by the

authority of Geddes, the act was not binding upon the firm or upon the individual members of it, because it was beyond the scope of the partnership business, which did not extend to carrying passengers from Pascagoula to Mobile; that their business, in which they were engaged, was to go with the mail-boats direct from New Orleans to Mobile, without stopping at intermediate points in the winter season, and that the public had notice of this, by the general course of business of the company, and by advertisements in the newspapers, and therefore, that Geddes had no power, either as a copartner or as agent of the firm, to bind his copartners by an act so foreign to the proper business of the company.

It is true that a partner cannot bind the firm by an act clearly not within the partnership business; yet he has power to bind the firm in all parts of the business in which it is engaged, and in all transactions, whether direct or incidental, appertaining to its business. And though the partner exceed the terms of the partnership, yet so far as third persons having transactions with them without notice are concerned, the copartners are bound, if the transaction be such as third persons may reasonably conclude to be embraced within the partnership business, or be incident or appropriate to such business, according to the ordinary course and usage of carrying it on: *Collyer on Part.*, sec. 384. In transactions which, from their nature, appear to the world to be legitimately connected with the business of the partnership in which they are openly engaged, arrangements between the partners cannot affect their ordinary responsibilities to third persons who have not assented to such arrangement, or have not had notice of it: *Id.*, secs. 386 et seq. The formation of the partnership, and the apparent inclusion of the particular transaction within the kind of business pursued by the firm, import a general authority held out to the world, to which the world has the right to trust: *Winship v. United States Bank*, 5 Pet. 529, 561.

It appears by the evidence in the record that from the first of November to the first of June the regular course of the mail-boats belonging to the company, as advertised in the newspapers at New Orleans, was not to stop at any point on the coast on their trips from New Orleans to Mobile. But it is shown by the testimony of the clerk of the boat, whose failure gave rise to this suit, that it was the custom of the mail-boats to land on the coast whenever they advertised to do so at any particular point, and to comply, unless in the judgment of the captain and pilot

It would endanger the prompt arrival of the mail. Thus it appears that, although the general course was not to stop at the points on the coast in the winter season, yet it was their practice to make special appointments to stop, and to comply with them unless prevented by good causes. This is shown to have been the custom of the company; and it must be presumed to have been relied on by the community, whenever notices were given of these special stoppages. Not only, then, were these special stoppages apparently within the business in which the company was engaged, but it was their practice to make them, as a part of their regular and legitimate business, upon notice given to the public that they would do so; and it cannot be said that they were not as much bound for the legal consequences of such appointments as they were for those appertaining to their engagements at New Orleans and Mobile.

Another objection urged against the instruction is that it did not confine the jury, in determining the question whether the publication was intended as a notice that passengers would be taken on the appointed trip, to the evidence before them, but left them to act on their belief from any cause.

This objection does not appear to have been made to the instruction when it was given. The evidence tended clearly to show that the transportation of passengers and freight from the points at which the boats of the company touched, as well as the conveyance of the mails, was a material part of the business in which they were engaged; and that does not appear to have been contested on the trial. The jury were therefore well warranted in believing that the appointment and notice in question were made with reference to both of these objects. And though the objection, which is rather literal than substantial in its character, might have been sustained before verdict, yet after verdict, and when the finding upon the point appears to be sustained by the evidence, it is too late to raise such an objection and give it the effect of setting aside the verdict. The presumption is that the verdict was found on the evidence, because the evidence warranted the finding.

It is also objected that the letter could not be considered as a notice to take passengers, but must be held to have reference only to taking the mail, and to persons interested in transmitting letters and papers by the mail; and further, that it was not competent to explain by evidence, apart from the letter, what was intended by the postscript to the letter, to "advise all who may feel interested in the above." But these objections are

manifestly untenable. It was certainly competent to show what class or classes of persons were intended to be embraced in the general expression, "all who may feel interested," in the notice. And the persons intended to be notified must have been such as were concerned in the ordinary business in which the mail-line company were engaged. If that business was both to carry mails and to transport passengers at the same time, it was competent to show that fact in order to understand the persons for whom the notice was intended.

Nor can the letter and postscript be properly considered as having reference only to the mail, and persons interested in that. The language is general, that all "who might feel interested" in the fact that a mail-boat would stop at Pascagoula at the time appointed should be advised thereof. If they were interested in any other manner than with respect to the mail, they are embraced within the general language used. And it is plain that the notice was intended for others than those interested in the mail, because it was the business of the postmaster to give notice of the facts that an extra mail would leave that point at the time appointed; and it is not to be presumed that the mere carriers of the mail intended to direct him as to a matter connected with his duty. Something more than this was clearly intended.

The question was, whether the mail-line company were under a legal obligation to stop at Pascagoula at the time specified, and to take passengers on their boat to Mobile. In determining that question, it was proper to consider not only the letter making the appointment, but the circumstances under which it was written, if necessary to a correct understanding of it, and the business in which the company was engaged and with reference to which it written; and upon no just principle could the extent of the obligation be confined to the letter itself. Moreover, there was no objection to the admission of the parol evidence upon this point, and no motion to exclude it or to direct the jury to disregard it. And upon this ground it was proper to be considered by the jury.

The second instruction given at the instance of the plaintiffs is objected to, because it assumes that the company authorized the letter, or were bound by it. This objection has already been considered in what is above said upon the first instruction; and for the reasons then stated, no prejudice was done to the defendant by the reference in this instruction to the notice and publication of the stoppage of the boat.

The next objection is to the fourth instruction, which is as

follows: "That no engagement of said steamboat mail-line, as carriers of the mail, is any extenuation or excuse for their breach of promise to the plaintiffs, made by their written engagement given in evidence in this suit."

This instruction is objected to on the grounds: 1. That it was the primary business of the company to carry the mail, and that if there were just grounds for believing that they would fail in their obligation to deliver the mail in due time at Mobile by reason of the boat's stopping at Pascagoula, according to the appointment, the boat was justifiable in not complying with the appointment; and 2. That the obligation to deliver the mail, and the danger of failure therein, in consequence of the state of the winds and weather at the time, were sufficient reasons why exemplary damages should not be awarded.

This objection proceeds upon the assumption that the paramount obligation of the company was to carry the mail. But that does not appear to be sustained by the evidence. On the contrary, for aught that appears, the company were as much bound to transport passengers as to carry the mails in their boats. Both of these branches of business appear to have been equally objects of pursuit and profit by the company; and the rights of the public were independent of those of the United States. In the absence of any statute regulations, or of any special contract, the obligations entered into to the United States could not impair the obligations of the company to individuals, in the due course of their business; and if the company thought fit to incur obligations to different parties, the performance of which might be incompatible with each other, both parties being entitled in equal right, it would be no excuse to the party aggrieved by the default that the company could not perform both obligations, and thought proper to perform that to the other party. For each party had an equal right to performance of the obligation; and it was the misfortune or fault of the company if they undertook incompatible obligations, but no ground of immunity from either of them. If, therefore, it was the duty of the company to send their boat to Pascagoula at the time specified, as a carrier of passengers and freight, according to the course of their business, they had no right to disregard that obligation, and to excuse themselves because they were unable to perform that obligation and also the contract which they had made to carry the United States mail. And it was for the jury to determine, upon consideration of all the circumstances, whether of mitigation or of aggravation, what damages

should be awarded to the party aggrieved by the delinquency. We think, therefore, that there was no error in this instruction.

Again: objection is made to the refusal of the fourth instruction asked by the defendant, which is that "if the plaintiffs went to Pascagoula, knowing that the boat would not or could not stop there on the night of the twenty-fourth of December, 1853, with a view to seek an advantage, or to get a cause of action so as to enable him to sue the defendant for damages, the verdict should be for the defendant."

There appears to be no evidence tending to show that McCaughan went to Pascagoula with the knowledge or intention here supposed. For he did not know of the appointment until he arrived there; and he had made arrangements to go to Mobile otherwise, until he learned that the mail-boat would stop on her trip to that place at the time specified. There is nothing whatever to show that he supposed that the boat would not, or could not, comply with the appointment. Indeed, his entire conduct shows quite the contrary. There was, therefore, no evidence upon which the instruction could be properly predicated; and that is a sufficient reason for its refusal, for it could have had no other effect than to suggest to the jury facts which were not in evidence before them.

The last objection to the instructions which we will notice applies to those in relation to the rule of damages. The sixth instruction given at the instance of the plaintiffs is as follows: "If the jury believe from the evidence that the plaintiffs, relying upon the written publication of the defendant, did await on the wharf, and at the usual place, for the arrival of the mail-boat promised, and said boat did not come in, and that said publication was false, and calculated to deceive, and did deceive, the plaintiffs, they may assess such damages for such false publication and deceit as in their discretion they may consider the plaintiffs suffered by such falsehood and deception."

On the contrary, the following instructions were asked in behalf of the defendant, and refused: "7. That if the jury shall believe from the evidence that the plaintiffs are entitled to recover any damages, then the true rule of estimating such damages is the actual amount of pecuniary loss sustained by the plaintiffs for money paid out and for their time lost."

"9. That the true rule of estimating damages for the non-performance of contracts or duties created or imposed by the law, in which there is no element of fraud, willful negligence, or malice, is the direct pecuniary loss, which includes no more

than the money actually expended, and fair compensation for the time lost by the plaintiffs in this case, and the jury should be governed by this rule in estimating the damages in this case."

Instead of this last instruction, the court gave the following: "That the jury should not in this case assess exemplary damages against the defendant unless they believe that their representations to the traveling public were false, and calculated to deceive, and did deceive, the plaintiffs."

The objection to the rulings of the court, upon these instructions, assumes that the action was founded on the special contract of the mail-line company. We have above seen that such is not a proper view of the nature of the action, which is one of tort for the personal grievance done to the plaintiffs by fraud, gross negligence, or oppression. And in such cases it is now too well settled to admit of controversy, that the jury may in their discretion award such damages by way of punishment, or for the sake of example, as they may think that the peculiar circumstances of the wrong to the plaintiff justifies: *Sedgwick on Damages*, 88, 39, et seq., 489 et seq.; *Bell v. Morrison*, 27 Miss. 68; *Vicksburg etc. R. R. Co. v. Patton*, 31 Id. 156 [*ante*, p. 552].

There was testimony tending to show that the captain in charge of the boat, which was published to stop at Pascagoula at the time specified, willfully and capriciously disregarded the obligation incurred by the publication; and that the failure occasioned great bodily exposure, and mental suffering and disappointment to the plaintiffs. These circumstances were properly submitted to the jury to be considered by them, together with the circumstances of excuse or extenuation relied upon by the defendant; and it was their province to determine whether there was such fraud, or willful neglect of duty, causing oppression to the plaintiffs, and under such circumstances of aggravation as to warrant exemplary damages. This was the substance of the rulings of the court upon this point, and we perceive no error in them.

Exception was taken on the trial to the admission of evidence of the peculiar condition of health of Mrs. McCaughan at the time of the grievance, and it is now contended that this evidence was inadmissible, because her peculiar bodily condition was not alleged in the declaration as a circumstance of aggravation.

The action was for general damages arising directly from the grievance complained of, and as the necessary effect of the

wrong. In such cases the law implies or presumes damages to have accrued from the wrong, and it is not necessary to state the particular circumstances of aggravation in the declaration: 1 Ch. Pl. 428; *Burress v. Madan*, 2 Johns. 145. The rule is otherwise where the damage sustained has not necessarily accrued from the act complained of, and consequently is not implied by law. In such cases, it is necessary that the declaration should state the special damage complained of, in order to prevent surprise on the defendant: 1 Ch. Pl. 428.

The condition of the plaintiff's health is not alleged to be the special ground of the wrong, but it was proved on the trial as a circumstance of aggravation of the wrong, and to show how grievously the act, which was wrongful in itself, operated to the bodily distress of the plaintiff and his wife. This was entirely competent under the pleadings: *Sedgwick on Damages*, 210.

It remains only to consider the grounds upon which it is urged that a new trial should have been awarded on the defendant's motion, and which have not been already considered.

1. It is said that as there was no evidence tending to show that Heirn had any actual participation in making the appointment for the stoppage of the boat at Pascagoula, or in giving the notice, or in the failure, he could not be held responsible, though his copartners Geddes and Grant might be; for one partner is not chargeable with the tort of his copartners, done without his knowledge.

This would be true if the wrongful act was wholly unconnected with the partnership business. But where it is connected with the business of the firm, and is incident to it as the business is carried on, the tort of one partner is considered the joint and several tort of all the partners; and the partner doing the act is considered as the agent of the other partners. And it is held that in such cases all the members of the firm may be sued, or any one of them may be sued alone: *Collyer on Part.*, sec. 457.

The evidence here was sufficient to sustain the finding of the jury, that it was the practice of the company to land their boats which plied from New Orleans to Mobile at points on the intermediate coast, upon giving special notice thereof; and though this was done only occasionally during the winter season, it was a part of the business in which the company were engaged, and legitimately connected with it. But there is also testimony tending to show that the duty of publishing the voyages of the boats of the company was intrusted to Geddes, from whose office the

announcement in this case was made. And whether he is regarded as acting as partner or agent, his acts connected with the business of the company are chargeable either against all or any of the partners, and of course any of the partners is chargeable *civiliter* to the same extent to which his copartner would be bound. If there has been an abuse of the authority exercised by the partner, that may be a matter to be settled between the partners. But the rights of third persons whose rights are affected by the transactions of one partner acting for the firm, in the course of its legitimate business, depend upon wholly different principles.

2. It is contended that exemplary damages should not have been awarded, because the danger of landing at Pascagoula, by reason of the low tide and high wind at the time, was a sufficient excuse for not complying with the engagement; and at all events, that these facts show an absence of such gross neglect or willful violation of the engagement as would entitle the plaintiffs to exemplary damages.

As to the practicability of making the landing at the time the testimony is conflicting, and it was for the jury to determine whether they would credit the witnesses for the plaintiffs or those for the defendant. It is plain that they acted upon the testimony of the former; and their finding is conclusive of the fact, under the circumstances in which it was presented for their determination.

It also appears that the question of gross neglect or willful violation of duty was submitted for their decision upon the evidence and instructions. And upon that point, in addition to the superior weight which they gave to the testimony of the plaintiffs' witnesses bearing upon it, there was also evidence showing that Grant, the captain of the boat, whose duty it was to stop, declared before leaving New Orleans, and before he could have known of the dangers of landing arising from the stormy weather, that he would not comply with the engagement. And considering all the evidence upon the point, we cannot say that the jury acted erroneously in finding as they did.

Having thus considered the several grounds of error insisted upon, we are brought to the conclusion that there is nothing in the record which would justify a reversal of the judgment; and it is accordingly affirmed.

INSTRUCTION IS ERRONEOUS which assumes a fact to be proved, instead of leaving it to the jury. This is so, notwithstanding that the proof establishes the fact beyond a reasonable doubt; *Crozier v. Kirby*, 51 Am. Dec. 724; *Bat-*

timore & S. R. R. Co. v. Woodruff, 59 Id. 72; *Warren v. Jacksonville*, 58 Id. 610.

INSTRUCTION WHICH HAS NO APPLICATION TO FACTS OF CASE IS ERRONEOUS: *Doty v. Strong*, 40 Am. Dec. 773; *Pennington v. Yell*, 52 Id. 262; *Cole v. Sprout*, 56 Id. 696; *Covles v. Bacon*, Id. 371; *Johnson v. Jennings*, 60 Id. 323; *Duggins v. Watson*, 60 Id. 560.

POWER OF PARTNER TO BIND FIRM OF WHICH HE IS MEMBER: See *Western Stage Co. v. Walker*, 65 Am. Dec. 789, and note 798.

EXEMPLARY DAMAGES, ALLOWANCE OF, IN GENERAL: See note to *Austin v. Wilson*, 50 Am. Dec. 767; also *Black v. Carrollton R. R. Co.*, 63 Id. 586; *McGray v. City of Lafayette*, 43 Id. 239, and note. Punitive damages will not be allowed as against principal unless he participated in the wrongful act of his agent, expressly or impliedly authorizing or approving it, either before or after it was committed, so that he becomes *particeps criminis* of his agent's acts: *Hagan v. Providence etc. R. R. Co.*, 62 Id. 377, and extensive note.

DAMAGES—PLEADING.—Damages which necessarily result from the act complained of are termed general damages, and may be shown under the common allegation *ad damnum*, for the defendant must be presumed to be aware of the necessary consequences of his conduct. But damages that do not necessarily flow from the act complained of, though possibly attendant upon it, are denominated special damages, and must be particularly specified in the declaration, or the plaintiff will not be permitted to give evidence of them: *Laing v. Colder*, 49 Am. Dec. 533; see also *Orain v. Petrie*, 41 Id. 765; *Donnell v. Jones*, 48 Id. 59; *Cunningham v. Smith*, 60 Id. 333; *Cole v. Swannston*, 52 Id. 288; *Driggs v. Dwight*, 31 Id. 283.

PARTNERS ARE LIABLE FOR TORT COMMITTED BY ONE OF THEIR NUMBER in the prosecution of the partnership business: *Champion v. Bostwick*, 31 Am. Dec. 376; *Stockton v. Frey*, 45 Id. 138; *Locks v. Stearns*, 35 Id. 382; *Holbrook v. Wright*, Id. 607, and notes.

OBLIGATION OF CARRIER TO STOP FOR PASSENGER AT TIME ADVERTISED.—We shall endeavor here to collect the cases upon that very interesting question, adverted to, and to some extent discussed, in the principal case, to wit: the duty and obligation of carriers of passengers to stop at regular stations and take on such passengers as desire passage, and to run their conveyances or trains on time as advertised in their schedules or time-tables. This question cannot fail to be one of vital importance to the traveling public generally, and especially to that large class of enterprising persons engaged in the passenger-carrier business. In view of the extent to which this business has been followed, and the length of time which has elapsed since the employment has become a well-recognized occupation, it is a matter of surprise that so small a number of cases should arise in which this question has been decided or discussed. This dearth of authority appears to have influenced the decision of a recent well-considered case, where the court observe that "in this country nearly all the railroads publish time-tables, and delays not attributable to negligence are not uncommon; yet suits to recover damages for detention in such cases are almost, if not quite, unknown. That such actions are almost unprecedented 'shows very strongly what has been understood to be the law upon the subject:'" *Gordon v. Manchester & Lawrence R. R. Co.*, 52 N. H. 596-605. The leading case upon this question is *Denton v. Great Northern Railway Co.*, 5 El. & Bl. 860; S. C., 34 Eng. L. & Eq. 154. In this case the defendants issued and circulated their time-table for March, 1855, wherein

they advertised that a certain train would leave London at a certain time, and arrive at other stations along the route at specified times. This train was afterwards discontinued. Plaintiff, who wished to take passage upon it, went to the station at the advertised time, demanded a ticket from the clerk, and tendered him the price of it. As the train was not running, he of course refused to issue it. Plaintiff brought an action against the company. In the opinion of the court of queen's bench therein, Lord Campbell, C. J., said: "This is certainly a very important case, both to railway companies and the public. It seems to me that railways would not be that benefit and accommodation to the public which we find them to be if the representations made in their time-tables are to be treated as so much waste paper, and not considered as the foundation of a contract. I think the plaintiff is entitled to recover, both on the ground that there was a contract, and also for a false representation. I think there was a binding contract, and that the case is the same as if the company should publish, in express terms, that if customers would come to a particular station at a particular hour a train would be passing at that hour, or near the hour, and that any person who tendered his fare should have a ticket, and be carried from that station to some other given station." Again, his lordship said: "This time-table contained what the law calls a false and fraudulent representation, and the defendants thereby made themselves liable." This is about the strongest case holding the liability of a carrier of passengers for a deviation from his time-table. But it is obvious that his lordship based his decision rather upon the fraud in advertising a train when in fact there was none run, than upon anything else. And as will be seen from the above, except from his opinion, he intimated that had the train been simply late, had it passed "near the hour" advertised, the case would have been different.

This case has been cited as holding a stricter rule, and being more stringent in its requirements of exact compliance with published time-tables, than its doctrine would warrant. For example, Angell cites it to support the following proposition: "Railroad companies are liable to the institution of legal proceedings against them for not running their trains in conformity with their regular official time-tables, the time-tables being of the nature of special contracts, so that any deviation from them renders the company liable:" Angell on Carriers, 5th ed., sec. 527 a. This rule is broader than *Denton v. Great Northern Railway Co.*, *supra*, and we think broader than is warranted by any of the cases cited to support it. Other cases unqualifiedly holding a carrier liable for not stopping at a station to take on a passenger, or for failing to run his trains on time, are: *Hawcroft v. Great Northern Railway Co.*, 8 Eng. L. & Eq. 362; S. C., 16 Jur. 196; *Sears v. Eastern Railroad Co.*, 14 Allen, 433; *Indianapolis, B. & W. R'y Co. v. Birney*, 71 Ill. 391.

Hawcroft v. Great Northern Railway Co., *supra*, was a case where the plaintiff purchased an excursion ticket, by which defendant agreed to convey him to and from a certain place where a fair was being held, at any time within fourteen days from the date of the ticket. Two trains were employed to convey the persons attending the fair on their return home. One train left in the morning and the other in the evening. Plaintiff endeavored to return by the morning train, but although there were an unusually large number of coaches attached, they were so crowded that he was unable to board the train. An extra train was dispatched in the middle of the day, but for the same reason plaintiff was unable to take passage upon it. He was thus compelled to remain over until the evening train, and by so doing he missed connection with another train which was to convey him to his home. To his

action for damages, the defense was interposed that the company had done everything in its power to procure accommodations for plaintiff; that they had dispatched an extra train, and that they had endeavored to send another, but were unable to do so, not having sufficient coaches, engines, or servants. Also, that they could not be sued for refusing to convey a passenger when they had no room for him. The court, in holding the defendant liable, decided that the ticket constituted an agreement or contract to convey plaintiff by either the morning or evening train, as he should elect, and that to be excused on account of the overcrowded condition of their cars, they should have made that an express condition of their contract. The court, in this case, however, lay considerable stress upon the fact that the defendants made no effort to convey the plaintiff to his home, or explained to him with respect to the stopping of their train at the station for which his train home took its departure.

The case of *Sears v. Eastern Railroad Co.*, *supra*, is very strong. It holds that railroad corporations, by advertising the hours when trains will start, agree with holders of tickets that trains will start at such hours. In this case the company postponed the time of starting a train from 9:30 to 11:15 without giving plaintiff notice until after he had purchased his ticket. This was held to be a violation of their contract with him, and to subject them to an action at his suit. The remaining case of *Indianapolis, B. & W. R'y Co. v. Birney*, 71 Ill. 391, is one where the court assume that a party has a right of action against a railroad company for refusal to stop its train and take him on. The question is not discussed, nor are any cases cited.

We now come to the case of *Hurst v. Great Western R'y Co.*, 19 C. B., N. S., 310, which is a partial limitation of the above rule. In this case the time tables stated that a train would be ready to leave plaintiff's station at 4:34 A. M. It did not do so, however, this time, and was not ready to leave until after six o'clock, which delay was the cause of making plaintiff miss connection with another train, and occasioned him considerable delay. It appears that the time-table referred to contained a clause which stated that the company did not warrant that their trains would arrive with punctuality at the times indicated at the different stations. In deciding the case, Earle, C. J., said: "I am of the opinion that the mere taking of a ticket does not amount to a contract on the part of a railway company, or impose upon them a duty to have a train ready to start at the time at which the passenger is led to expect it; and in order to maintain an action, it is incumbent on the plaintiff to show either a breach of contract or a breach of some legal duty. If there were any such contract here, it would appear from the time-bills published by the company; and if the plaintiff (whose duty it was to do so) had put in the time-bill, we should have seen what the real contract was, viz., that the company do not warrant that their trains shall arrive with punctuality, at the times indicated, at the different stations." The court appear, in this case, to attach considerable importance to this reservation or condition in the published time-table. To that extent it is not such a wide departure from the above cases.

We now come to what appears to be the more reasonable rule applicable to the cases under discussion. It is laid down in *Gordon v. Manchester & Lawrence R. R. Co.*, 52 N. H. 596, and *Prevost v. Great Eastern R'y Co.*, 13 L. T., N. S., 20; and is to the effect that the publication of a time-table, in common form, imposes upon a railroad company the obligation to use due care and skill to have the trains arrive and depart at the precise moments indicated in the table; but it does not import an absolute and unconditional

engagement for such arrival and departure, and does not make the company liable for want of punctuality which is not attributable to their negligence. In this latter case, which was *at nisi prius*, Crompton, J., said that "the plaintiff can only recover on the ground that there has been negligence or want of care on the part of the company. Negligence or a breach of duty must be proved to entitle the plaintiff to recover." The former case, *Gordon v. Manchester & Lawrence R. R. Co.*, 52 N. H. 596, is a comparatively recent case, having been decided in 1873. It contains an analysis of all the previous cases, and a more extensive discussion of the nature, character, and the right to maintain actions of the character herein treated of than any other case.

WELCH v. LAWSON.

[32 MICHIGAN, 170.]

DAMAGES FOR BREACH OF PAROL AGREEMENT FOR SALE OF LAND.—Defendant agreed, by parol, to sell a piece of land to plaintiff, and to execute the proper written evidence of the bargain. Plaintiff, in faith of the agreement, at considerable expense, went into possession of the land. Defendant, without assigning any reason, refused to comply with his contract and forced plaintiff to abandon his possession. *Held*, that while it is unquestionably true that no action can be maintained either to recover damages for the loss of the land or the bargain, or for a specific performance, yet plaintiff is entitled to recover compensation for his trouble, loss of time, and expense. He may recover damages resulting from the fraudulent conduct of the defendant.

Action for damages. The opinion states the facts.

Aldridge and Gollady, for the plaintiff in error.

D. L. Herron, for the defendant in error.

By Court, FISHER, J. The plaintiff below brought this action in the circuit court of Yalobusha county, to recover damages occasioned by the defendant's refusal to consummate a parol agreement between the parties, in regard to a tract of land, which it is alleged the defendant agreed to sell to the plaintiff.

The most important question for consideration arises upon the demurrer of the defendant to the complaint of the plaintiff. The complaint alleges that the parties had been negotiating for some time in regard to the contract, and that the plaintiff finally made a definite offer of one thousand dollars for the land; that the defendant asked for time to consider of the proposition; and that he afterwards, on the twentieth of December, 1854, sent a messenger to the plaintiff, and informed him that his proposition was accepted; that he could take immediate possession of the land; and that the parties would, at some convenient

time thereafter, enter into the necessary writings evidencing the contract; that the plaintiff, confiding in the good faith of the defendant, accordingly took possession of the land, and removed his family and entire personal property a distance of about fifteen miles on the premises; that he, some short time thereafter, notified the defendant of his, plaintiff's, readiness to close the contract according to the understanding between the parties; but that the defendant, without assigning any reason, refused to complete the contract, and forced the plaintiff to abandon the possession, and to seek a residence elsewhere, at a season of the year when it was difficult to obtain one. The complaint then proceeds to state that the defendant, from the first inception of the contract, intended to commit a fraud upon the plaintiff, and did not intend to carry out his promise to consummate the agreement of the parties, by writing, as was understood between them; and finally to set forth the manner in which the plaintiff had been injured.

The demurrer to the complaint proceeds upon the ground that the action was brought upon the contract of the parties in regard to the purchase or sale of the land, and the contract, not having been reduced to writing, could neither be enforced by the plaintiff, nor violated by the defendant, so as to give to the plaintiff a cause of action. If it were true that the action was brought to recover damages resulting merely from a violation of the parol agreement, the demurrer should have been sustained. But such was not the nature of the action. It was intended to recover damages resulting from the fraudulent conduct of the defendant. The plaintiff was seeking compensation for his trouble and loss of time, and not compensation for the loss of a bargain, in not getting the land, about which the parties had a parol understanding. The plaintiff merely said to the defendant, Pay me for my trouble and loss of time occasioned by your fraud or bad faith; I ask nothing for the loss of my bargain, but only to be placed in the same situation in which I stood before I trusted you.

Thus viewing the action, we are of opinion that the demurrer was properly overruled. Almost all contracts must go through various stages before they are finally consummated; and whether a party will be liable for a breach of faith before the final consummation of the contract must depend upon the extent to which he induced the other party to trust him. As, for instance, suppose a man at Jackson is negotiating with a man at Columbus for the purchase of a tract of land, and

the parties understanding the terms of the proposed contract, the one at Columbus should say to the other at Jackson, that if he would come to the former place the contract should be closed by writing, as understood between them, would not the party incurring the expense and trouble thus occasioned have a clear right to compensation for such trouble, loss of time, and expense, if the party at Columbus should refuse without sufficient reason to comply with his promise? No good reason can be assigned why an action could not be maintained in such a case. The party went not to make, but to close, a contract. He would not go to Columbus merely to ascertain whether such a contract could be made, but to give legal form to one already understood between the parties.

The case would fall under a familiar rule—that he had incurred expense and trouble at the request of the defendant—and a right to compensation would follow as a matter of course, not for the loss of the bargain, but for the loss actually sustained, or for the trouble and loss of time incurred. It is a salutary principle of law that every man is bound to the observance of good faith to the extent that he knows that he is trusted; and it is not necessary to hold him liable that he was not in a situation to be benefited; he must act so as not to injure another by his conduct. Applying the principle to this case, the defendant knew the extent to which he was trusted, and had by his own act secured the confidence of the plaintiff. He could not be ignorant of the trouble and expense which would necessarily be incurred by the plaintiff if he reposed such confidence in the assurances of the defendant as one man may reasonably repose in another. Under such circumstances, while it is unquestionably true that no action can be maintained either to recover damages for the loss of the land or bargain, or for a specific performance, yet to hold that the action cannot be sustained to recover for the injury or loss already named would be equivalent to saying that the subject was one in regard to which fraud or bad faith could not be practiced.

Having disposed of the question arising on the demurrer, but little remains to be said in regard to the other questions. The defendant, in his answer, relied upon the statute of frauds as a defense, and the court sustained a demurrer to this answer; what has already been said disposes of this question. The action not being founded upon a contract required to be evidenced by writing, a plea that the contract was not in writing would of course be insufficient.

In conclusion, it is only necessary to say as to the other point that the verdict is fully sustained by the testimony.

Judgment affirmed.

WHERE ONE VERBALLY AGREES TO CONVEY LAND in consideration that another will do some act, which he does, though no action can be brought to enforce the verbal promise, yet if the party cannot be restored to his original condition prior to the contract, compensation can be recovered for the performance of his part of the contract: *Benge v. Hyatt's Adm'r*, Ky. Ct. of App., March 14, 1885, 6 Ky. L. J. 714.

THE PRINCIPAL CASE IS CITED and explained in *Cain v. Kelly*, 57 Miss. 830, where the court hold that the vendee of land under a parol agreement can recover only for loss directly incurred by reason of the vendor's fraud, and upon a state of case which would sustain an action for deceit. He cannot recover for losses sustained by anything which occurs between himself and the vendor, after he hears of the latter's unwillingness to reduce the contract to writing, because of doubt as to his right to sell the land.

NEVITT v. BACON.

[33 MISSISSIPPI, 213.]

RIGHT TO FORECLOSE MORTGAGE IS NOT BARRED BY SAME LAPSE OF TIME which bars an action upon the note secured by the mortgage.

STATUTE OF LIMITATIONS COMMENCES TO RUN AGAINST MORTGAGE FROM TIME RIGHT TO FORECLOSE ACCRUES, and that period of time which would bar an action at law to recover possession of the mortgaged property, after condition broken, will bar a bill for foreclosure in equity, unless there be circumstances shown sufficient to take the case out of the bar of the statute.

DEMURRER TO BILL WHICH ALLEGES THAT CERTAIN DEBTS ARE DUE AND UNPAID, upon the ground that they are barred by the statute of limitations, does not admit the non-payment of such debts to the extent of rebutting the presumption of satisfaction created by the statute. The demurrer in such a case is equivalent to a plea of the statute. The defense set up is not the presumption on which the statute is founded, but the bar created by its positive provisions.

PARTY CANNOT DEDUCT FROM PERIOD OF STATUTE OF LIMITATIONS applicable to his case the time consumed by the pendency of an action in which he sought to have said matter adjudicated, but which was dismissed without prejudice as to him.

BILL for the foreclosure of a mortgage. The opinion states the facts.

W. P. Harris, John R. Coleman, and T. J. and F. A. B. Wharton, for the appellant.

George S. Yerger, for the appellees.

By Court, **HARDY, J.** This was a bill filed by the appellees in the superior court of chancery, on the seventh of May, 1855, to foreclose a mortgage made by the appellant bearing date the twenty-sixth of May, 1841, to secure three promissory notes of the same date, to become due one in one year, the next in two years, and the third in three years from that date.

The bill states that the appellant had made a prior mortgage upon the same property embraced in this mortgage, to James Brown, who filed his bill in the district chancery court at Natchez for a foreclosure, and that the appellees upon their application were made parties to that suit; that they prayed that an account should be taken of their mortgage debt, and that the same should be paid after the payment of the debt due to Brown; that an appeal was taken by the appellees from the decree of that court to the superior court of chancery, and from the latter court to this court; and that at October term, 1854, this court refused to allow an account to be taken of the appellees' claim, because it was necessary that they should file a bill to foreclose their mortgage and redeem Brown's, and affirmed the decree of the chancery court dismissing the suit as to the appellees, without prejudice to their right to file their bill to foreclose as to any surplus of the property not required to pay the prior mortgage.

The bill offers to redeem the prior mortgage, alleges that the notes held by the appellees are unpaid, and prays an account and foreclosure.

The appellant demurred to the bill, setting up the statutes of limitation applicable to various aspects of the case as a bar; the demurrer was overruled, and this appeal was thereupon taken. It appears that the last of the notes mentioned in the mortgage had been due nearly eleven years before the bill was filed, the two others having become due at a still earlier date. The first position taken in support of the defense of the statute of limitations is, that the right to foreclose the mortgage is barred by the same lapse of time that would bar an action at law upon the notes secured by it.

This rule is not without strong reason and principle, as well as respectable authority, to support it; and if it were a new question in this court, it would be worthy of grave consideration whether it should not be adopted. But the question has been frequently the subject of consideration here, and it is now as firmly settled as any doctrine of this court, that the remedy to foreclose the mortgage is not barred by the same lapse of time which

bars an action upon the notes secured by the mortgage: *Miller v. Helm*, 2 Smed. & M. 697; *Miller v. Trustees etc.*, 5 Id. 651; *Bush v. Cooper*, 26 Miss. 611 [59 Am. Dec. 270]; *Trotter v. Erwin*, 27 Id. 772. We do not feel justified in changing a rule of this nature, thus established, and it must therefore be regarded as settled law.

The next ground of the defense set up in the demurrer, and here relied on, is that the period of time which would bar an action at law to recover possession of the mortgaged property, after condition broken, must bar a bill of foreclosure in equity; and inasmuch as an action at law to recover possession was barred by the lapse of seven years after forfeiture, and more than ten years had elapsed in this case, the bill was barred.

This presents the question, whether any, and what, time bars the right of the mortgagee to foreclose against the mortgagor continuing in possession upon condition broken. It is insisted in behalf of the appellees that the mortgagor is to be considered as the tenant at will or at sufferance, of the mortgagee, after forfeiture of the condition, and not as holding adversely, and that the statute of limitations does not begin to run until that relation is dissolved, and the mortgagor claims possession in opposition to the rights of the mortgagee.

By the strict rules prevailing at law, the mortgagor was a mere tenant, holding subject to the right of the mortgagee to enter immediately and even before default, unless there was a stipulation to the contrary: 4 Kent's Com., 8th ed., 159. This was upon the technical rule that the conveyance was upon condition subsequent to be performed by the mortgagor; and until that was shown to have been performed, the estate vested in the mortgagee. And upon this principle, it was anciently held that whilst the mortgagor remained in possession without a covenant for that purpose he was a tenant at will. He was at a later period held to be a tenant at sufferance. The relations of the parties were thus regarded under technical rules at law. But these rules have been materially changed by courts of equity in more modern times, and principles have been established of a more liberal character towards the rights of the mortgagor, and more in consonance with the true spirit and the substantial justice of such contracts. This doctrine is that the mortgage is a mere security for the debt, and that until a decree of foreclosure, the mortgagor continues the real owner of the fee, and the equity of redemption is considered as the real and beneficial estate: 4 Kent's Com. 163.

The relation which existed between the mortgagor in possession before default, and the mortgagee at law, seems to have been a matter of great uncertainty. It is sometimes said to be a tenancy at will, and again it is variously called a tenancy from year to year, or at sufferance, or *quasi* at sufferance. Chancellor Kent calls it a "peculiar relation," and considers the name "mortgagor" as conveying the best idea of what he calls his "anomalous character." But by whatever term it may be designated, it appears to be plain that the relation of landlord and tenant cannot be said to exist to all intents and purposes, where the mortgagor retains possession after condition broken, in the absence of any agreement upon the subject in the deed. The mortgagor, before foreclosure, is not liable to the mortgagee for use and occupation, is not bound to keep the premises in repair, and is regarded as a freeholder, subject only to the equitable right of the mortgagee to foreclose in equity, or to enter at law, for the purpose of obtaining payment of his debt. He is, then, rightfully in possession until the mortgagee exercises his right according to law to turn him out.

The question, then, is, Within what time must this right be exercised, and what lapse of time is necessary to create the legal presumption that the right has been surrendered or lost? From what time does the duty to exercise this right begin?

It must commence at the time when the right of foreclosure accrued, or it can have no commencement; and unless it expire by the same lapse of time that would bar the right of entry, or the recovery of possession at law, it is without limitation, and may be asserted against the continued possession of the mortgagor at the most remote period. Where possession has been delivered to the mortgagee, it is well settled that the right to redeem is barred by the same length of time that would bar his recovery of possession at law. And the interest of the mortgagee is a much less beneficial estate than that of the mortgagor in possession. The mortgagee in possession before foreclosure holds subject to the right of the mortgagor to redeem. But after the period of the limitation of an action to recover possession at law, that right is presumed to have been released. So the mortgagor in possession holds subject to the right of the mortgagee to foreclose; and no reason can be perceived why payment of the debt should not be presumed from the same lapse of time, unless, indeed, no lapse of time can bar the claim of the mortgagee, which cannot be pretended.

It is not material to determine whether the possession of the

mortgagor is to be considered as adverse to the right of the mortgagee or not. The substantial interest which the mortgagee has in the mortgaged premises is in equity a claim upon them for the payment of his debt; and the question is, After what period of time and under what circumstances will that debt be presumed to be paid, and his claim upon the property depending upon it discharged? This is settled in many recent cases, and upon principles which we consider altogether sound and just. The supreme court of the United States say, in *Hughes v. Edwards*, 9 Wheat. 497, that "where a mortgagor has been permitted to retain possession, the mortgage will, after a length of time, be presumed to have been discharged by payment of the money, or a release, unless circumstances can be shown sufficiently strong to repel the presumption; as, payment of interest, a promise to pay, an acknowledgment by the mortgagor that the mortgage is still existing, and the like:" *Christophers v. Sparke*, 2 Jac. & W. 234; 4 Kent's Com. 201, 202; Angell on Limitations, 8d ed., secs. 453-455. And the period fixed by the statute of limitations as barring an action for the recovery of possession is held to be the fit and proper limitation to a bill of foreclosure: 4 Kent's Com. 202; *Jackson v. Wood*, 12 Johns. 242 [7 Am. Dec. 315]. This rule was held by this court in *Benson v. Stewart*, 30 Miss. 49, and we find no reason to change it.

And here it may be proper to remark, that what is said in that case with respect to adverse possession had reference to the party who purchased from the mortgagor in whose behalf the statute was not a bar when the bill was filed; and that party, not being protected by an adverse possession under his purchase from the mortgagor, for a sufficient length of time to be protected by the bar, he would occupy the position in which the the mortgagor stood, in whose favor the period of time necessary to constitute the bar had not run when the bill was filed against him. But it was not intended to say that as between mortgagor and mortgagee, where the former had retained possession after forfeiture, for a sufficient length of time to constitute a bar under the statute, it was necessary that there should be, technically, an adverse possession by the mortgagor against the mortgagee, in order to render the defense available.

We are satisfied that both principle and authority sanction the rule that when the mortgagor has continued in possession for a sufficient length of time after forfeiture, and after the maturity of the debt secured by the mortgage to bar the right of entry of the mortgaged premises, or an action to recover posses-

sion of the property conveyed, and an action at law upon the notes, or other evidence of debt, a bill of foreclosure will be barred, unless there be circumstances shown sufficient to take the case out of the bar of the statute. And there being no such circumstances shown in this case, the statute of seven years was a bar, and the demurrer was a good defense to the bill.

Two other grounds are relied upon, in behalf of the appellees, against the bar of the statute. The first of these is, that as the bill alleges that the debts are due and unpaid—and that is admitted by the demurrer—this rebuts the presumption of satisfaction created by the statute, and that presumption cannot prevail. The fallacy of this view is apparent from two considerations: 1. The defense of the statute set up by demurrer is tantamount to a plea of the statute, and must be taken with reference to the particular ground of defense set up in it; 2. It is true that the theory upon which the statute of limitations is founded is the presumption of payment from lapse of time. But the defense set up is not the presumption on which the statute is founded, but the bar created by the positive provisions of the statute. The principle upon which the statute is founded is sometimes useful to be considered in applying it to doubtful cases; but when the provisions are plain and positive, we have nothing to do with the principles upon which they are founded, in applying them to cases clearly embraced by them. The defense is the statute itself, and not the theory upon which it is founded.

The other ground is, that the former suit having been dismissed as to the appellees, without prejudice to their right to bring another suit, they are now entitled, in virtue of the privilege thereby reserved to them, to deduct the time of the pendency of that suit. This construction is justified neither by the terms nor the legal effect of the order referred to. The purport of such an order is that the dismissal shall not operate as a bar to a new suit which the party might institute: Story's Eq. Pl., sec. 793. It could never have been intended, even if it was competent for the court, to debar the appellant of any defense upon the merits of the case to which he was entitled by law; for that would have been to bestow a privilege upon the appellees, and at the same time to prejudice the rights of the appellant upon a matter not then presented for the determination of the court.

Let the decree be reversed, the demurrer sustained, and the bill dismissed.

UNINTERRUPTED POSSESSION BY MORTGAGOR FOR TWENTY YEARS, after condition broken, without entry or claim on the part of the mortgagee, raises the presumption that the mortgage debt has been paid: *Howland v. Shurtleff*, 35 Am. Dec. 385. Lapse of time may afford presumptive evidence of payment of mortgage: *Swart v. Service*, 34 Id. 211; see also *Drayton v. Mary Marshall*, 33 Id. 84; *Heyer v. Pruyn*, 34 Id. 355, and notes; Jones on Mortgages, sec. 1145.

MORTGAGE LIEN CONTINUES, ALTHOUGH DEBT SECURED BY IT HAS BEEN BARRED by the statute of limitations: *Heyer v. Pruyn*, 34 Am. Dec. 355, and cases in note. "The fact that a debt secured by a mortgage is barred by a statute of limitations does not necessarily, or as a general rule, extinguish the mortgage security, or prevent the maintaining of an action to enforce it:" Jones on Mortgages, sec. 1204, citing a large number of cases.

STATUTE RUNS IN FAVOR OF MORTGAGOR FROM TIME MORTGAGOR'S RIGHT OF ACTION ACCRUES: Jones on Mortgages, sec. 1210. "The period of limitation to a bill of foreclosure is the time fixed by the statute of limitations as barring an action for the recovery of possession of the mortgaged premises." Again: "The right of entry and the right of action to recover the possession of lands held adversely is only barred in seven years, and this is the time when the right of foreclosure ceases, and not before:" *Wilkinson v. Flowers*, 37 Mis. 584, 585, citing the principal case to each proposition.

WILLIAMS v. STATE.

[32 MISSISSIPPI, 399.]

CONSCIENTIOUS SCRUPLES entertained by a person, which would prevent him from assenting or agreeing to a verdict which would subject the accused to capital punishment, although justified by the evidence, disqualify him as a juror.

OBJECTION TO INFLECTION OF CAPITAL PUNISHMENT.—A juror whose examination developed that he was opposed to capital punishment; who said "that he had conscientious scruples upon the subject of capital punishment; that they would bias his judgment," is not in a condition to impartially hear and examine the evidence; he does not stand indifferent between the prisoner and the state, and he should be excused.

JUROR, WHEN CONSCIENTIOUS SCRUPLES TO INFLECTION OF DEATH PENALTY DO NOT DISQUALIFY.—A juror testified that he "did have conscientious scruples on the subject of capital punishment, and that it would be against his conscience to render a verdict by which a party would be subjected to the punishment of death, but that he thought he could do justice as between the state and the accused:" *held*, that he was competent, as in the absence of any other possible evidence his answer under oath that he would do justice between the parties must be held to be conclusive.

INSTRUCTION THAT "JURY ARE NOT ONLY JUDGES OF FACTS IN CASE, BUT THEY ARE ALSO the judges of the law," is erroneous, that doctrine having been abandoned in this country.

IN TRIAL FOR MURDER, IT IS ERROR FOR JUDGE TO INSTRUCT JURY GENERALLY UPON LAW OF HOMICIDE. He should charge them only upon

contested questions of law applicable to the issue, and at the request of one of the parties, or their counsel, distinctly specifying in writing the point of law in regard to which the instruction is asked.

TRIAL of the accused upon an indictment for murder. The opinion states the facts.

T. W. Harris, for the plaintiff in error.

D. O. Glenn, attorney general, for the state.

By Court, SMITH, C. J. The plaintiff in error was tried in the circuit court of Marshall county upon an indictment for murder, and convicted of manslaughter in the second degree. A motion was made in arrest of judgment and for a new trial, which being overruled, the prisoner excepted, and prosecutes this writ of error to reverse the judgment which was thereupon entered against him.

Several grounds are taken in this court upon which it is insisted that the judgment should be reversed and a *venire de novo* awarded. In proceeding to notice them, we shall pursue the order in which they are presented in the record.

The first exception relates to the rejection of certain persons as jurors. Henderson Kirk, having been examined by the court and pronounced competent, was put upon the state. Whereupon the district attorney asked him "if he was opposed to capital punishment." The question was objected to by the prisoner's counsel, but the objection was overruled. Kirk responded to the question in the affirmative, and stated, further, "that he had conscientious scruples upon the subject of capital punishment; that they would bias his judgment, and he would prefer being excused." The state then challenged him for cause, and the court sustained the challenge.

John B. Norfleet was also, after having been examined by the court and pronounced competent as a juror, turned over to the representative of the state, who propounded the same question to him. The question was likewise objected to by the prisoner, and his objection overruled. Norfleet thereupon answered that he "did have conscientious scruples on the subject of capital punishment; and that it would be against his conscience to render a verdict by which a party would be subjected to the punishment of death; but that he thought he could do justice as between the state and the accused." Whereupon he was challenged for cause by the state, and the challenge was sustained by the court.

We perceive no objection to the course of examination pur-

sued. Although the judge expressed himself satisfied of the competency of the persons produced as jurors, they were neither tendered to nor accepted by the prisoner; but were turned over to the district attorney, for the purpose, we presume, of further examination. In all cases of this character, it is the duty of the court to see that an impartial jury is impaneled, and that it is composed of men above all exception: *Lewis v. State*, 9 Smed. & M. 119. And although objections to jurors on the ground of conscientious scruples usually assume the shape of a challenge on the part of the prosecution, the court may set aside the juror of its own motion; and in *United States v. Cornell*, 2 Mason, 91, this was done without even swearing or affirming the jurors. In *People v. Damon*, 18 Wend. 351, the rule is laid down that the court may set aside incompetent jurors at any time before evidence is given.

But the objection mainly relied on involves the question of competency. It is insisted that in neither instance was the juror rendered incompetent by reason of the conscientious scruples declared and entertained by him. A large class of the community doubt the expediency of capital punishment, others have a strong repugnance to it, while some few individuals sincerely entertain conscientious scruples against it. It is this latter class which have been held disqualified from serving as jurors in cases in which a verdict of guilty would be followed by capital punishment, "provided only, however, that their scruples are such as would prevent them from finding a true verdict according to the evidence." And it is now too firmly settled to admit of controversy that conscientious scruples entertained by a person, which would prevent him from assenting or agreeing to a verdict which would subject the accused to capital punishment, although justified by the evidence, disqualify him as a juror: *Lewis v. State*, *supra*; *People v. Damon*, *supra*; *Commonwealth v. Leshner*, 17 Serg. & R. 155; *Jones v. State*, 2 Blackf. 475; *Martin v. State*, 16 Ohio, 364; *Williams v. State*, 3 Ga. 453. The reason upon which this rule is founded is that such scruples entertained by a juror incapacitate him as such in the performance of his part in the due administration of the law. He must violate his conscience or disregard the obligations which the laws of his country attach to the relation in which he stands. There is no third course by which he can escape from these alternatives. If placed on the jury, he is compelled either to violate his oath or his conscience, and a man who would do either is unfit to serve as a juror.

The conscientious scruples against capital punishment entertained by Kirk would, as he stated under oath, bias his judgment. The question then is, Was Kirk rendered incompetent as a juror by reason of those scruples? If sworn as a juror, the question which he would have to decide was, whether the evidence adduced on the trial proved beyond a reasonable doubt the facts alleged in the indictment constituting the offense. That was purely a question of fact, to be determined exclusively by the evidence. And it is said, as the subject of inquiry for the jury was entirely distinct from the question whether the state could rightfully impose the penalty of death as a punishment for crime, and from the question whether the juror would, in any case, without a violation of his religious obligations, consent to a verdict which would be followed by capital punishment, any scruples which the juror might entertain on these subjects, as they could not influence his judgment in weighing the evidence, ought not to exclude him unless his scruples were of such a character as to preclude him from convicting the accused of a capital offense; that guilt is a conclusion of law from facts judicially ascertained, and in the ascertainment of which the witness who testifies, and the juror who founds his verdict on his testimony, are equally actors; but as it is neither the juror nor the witness, but the law, that dooms the culprit to death, no better reason can be offered for excluding the juror than excusing the witness from testifying on the ground of conscientious scruples against capital punishment.

These arguments are more specious than solid. They do not meet the question. The question is not one of exemption from the discharge of a public duty upon the ground of religious belief or conscientious scruples: it is one which respects the fitness and competency of a person called to act in the capacity of a juror.

Conceding, for the purpose of argument, that Kirk's scruples would not influence his judgment in weighing the testimony, they were nevertheless, as he admitted, sufficiently strong to bias his judgment. If, then, according to the argument, his scruples would have no influence upon his mind in the examination of the evidence and the decision of the question of fact submitted to him, on what subject would his scruples operate? and in what way would they bias his judgment, as he admitted they would? Assuredly, if they operated at all in controlling his action, it would be by preventing him from consenting to a verdict, however conclusive the evidence

might be of the guilt of the accused, which would subject him to the death penalty. It is true, Kirk did not state that his scruples would preclude him from rendering a verdict in any case of a capital felony. But under the view in which the question is argued, it is clear, if his scruples touch him at all, they must of necessity produce that result. At all events, he could not convict the prisoner of murder without violating his conscience. He therefore did not stand indifferent; he was not in a condition in which he could impartially hear and examine, and acquit the innocent and convict the guilty. "He that is of a jury," says Coke, "must be *liber homo*; that is, not only a freeman and not bond, but one also that hath such freedom of mind that he stands indifferent as he stands unsworn." We therefore think that he was properly excluded.

In coming to this conclusion, we have gone a step further than the courts of this country have gone. The rule on this subject heretofore generally recognized is, that conscientious or religious scruples in regard to capital punishment, to disqualify from serving on juries, must be such as would prevent the person entertaining them from finding a true verdict according to the evidence, and compel him to disregard the obligations of his oath as a juror: 2 Graham & Waterman on New Trials, 258. We are satisfied, however, that the rule we have here applied is founded on sound principles, and necessary to the attainment of the true objects for which trials by jury were instituted.

The action of the court in reference to Norfleet, the second juror called and examined, presents a different question, and one which is not entirely free from doubt. The rule judicially recognized applying to this case is, that opposition to capital punishment which would not influence the mind of the juror, but would leave him free to find a true verdict according to the evidence, is no disqualification. This was held in *Commonwealth v. Webster*, 5 Cush. 295 [52 Am. Dec. 711]. This and the case before us are not precisely alike. Here the objections of the juror to capital punishment assume the form of conscientious scruples; and hence the reasons for excluding him are the stronger. But he stated that "he thought he could do justice as between the state and the defendant." It is not so clearly perceived how a juror who entertains conscientious scruples against capital punishment can perform his part in the due administration of the law when acting as a juror on the trial of a capital felony. If, however, we regard the obligation imposed by the oath of a juror paramount to any supposed moral duty

arising from a belief that the punishment of death is inexpedient and sinful, and he is thus unable impartially to weigh the evidence, and to find a verdict accordingly, it will not be contended that he is incompetent as a juror. Upon this supposition, he would stand "indifferent, as he is unsworn." And we suppose the answers of the juror are the only means by which his impartiality can be determined. If one called as a juror state that he has formed or expressed an opinion in regard to the guilt or innocence of the party charged, from the statement of persons which he believed, such person would not be a competent juror; although he might also state that he thought he could with perfect impartiality examine the case and render a true verdict according to the evidence. This is what any one might say, and what every honest man would endeavor to do. But he would be incompetent, because he would not stand indifferent between the parties. Having admitted the existence of an opinion, we know that evidence would be required to remove or to change it. We could thus reason from an admitted fact, and found a conclusion from the necessary effect of such admitted fact which would contradict the opinion expressed by the juror as to his impartiality and freedom from bias. But as it is impossible in any case to ascertain what effect would be produced, or whether any influence whatever would be exerted upon the mind of the juror in deciding upon the weight of evidence by his scruples, in reference to capital punishment, we are compelled to take the statement of the juror as conclusive. Whether such scruples would or would not control or bias his judgment must of necessity be left to him to decide. If, upon an examination of his own heart, he is satisfied that he can fairly and impartially weigh the testimony in the cause, and without bias render a true verdict, we do not think he ought to be excluded. In our opinion, therefore, the court erred in setting aside this juror.

Charges were granted at the instance of the district attorney, and excepted to by the prisoner. Numerous instructions were requested by the prisoner, all of which except one, which we shall hereafter notice, were given. Several of these were subsequently modified or explained by the court. As we must reverse for the error above pointed out, we deem it unnecessary to notice the objections raised in the argument in regard either to the charges given for the prosecution or to the modifications made in those granted for the defense.

The instruction refused by the court, and above referred to, is as follows: "The jury are not only the judges of the facts in

the case, but they are also the judges of the law." In many of the colonies, immediately preceding the revolution, the arbitrary temper and unauthorized acts of the judges holding office directly from the crown made the independence of the jury in law, as well as fact, a matter of great popular importance. From this cause the doctrine embodied in the charge under consideration grew into recognition, and for some time after the adoption of the federal constitution it was generally received. It is unnecessary to notice the course of judicial decisions on this subject. It is scarcely necessary to state that in no great while after *Fries' Case*, Am. Crim. L. 896, in which the doctrine was fully recognized by the court, who charged that "the jury are to decide on the present, and in all criminal cases, both the law and the facts, on their consideration of the whole case," the courts one after another abandoned the doctrine. In England it has always been held that the court were as much the judges of the law in criminal as in civil cases, and this doctrine is now undoubtedly sustained by the great weight of authority. Our own opinion upon the subject accords with that of Judge Story in the case of *United States v. Battisto*, 2 Sumn. 243, and we adopt his language in that case as fully expressing the views of this court. We hold, therefore, that there was no error in the refusal of the court to give the instruction.

After the court, at the request of the district attorney and the prisoner, had charged the jury, it proceeded of its own motion to charge them generally upon the law of homicide. This proceeding of the court was excepted to, and the charge, which was in writing, placed upon the record. It is now insisted that this proceeding was in violation of the statute, and constitutes good ground for reversing the judgment.

As an exposition of the law, in our opinion, the charge was unexceptionable. It was a succinct, extremely intelligible, and very accurate explanation of the principles of the criminal law applicable to the case before the jury. But in our opinion, it was a proceeding unauthorized, and in plain violation of the statute restricting the authority of the circuit judges to charge the jury in criminal trials, except under certain specified conditions: Hutch. Dig. 888, art. 9, sec. 14.

The object and policy of the act are declared in the preamble. They are to secure juries in the discharge of their appropriate functions from any improper influence on the part of the court, and thereby the better to preserve the sanctity of the trial by jury. And to these ends the legislature, according to the construction

of the statute which we think the proper one, has declared that any judge, before whom any issue of fact is tried, shall charge the jury only upon contested questions of law applicable to the issue, and at the request of one of the parties, or their counsel, distinctly specifying in writing the point of law in regard to which the instruction is asked.

We are bound to believe that no officer of the state would designedly transcend the authority vested in him by the law; and in this particular case, that the learned judge proceeded upon reasons which were satisfactory to himself. But upon this interpretation of the statute it is impossible to justify the course pursued by the court.

Judgment reversed.

HANDY, J., delivered a dissenting opinion.

THAT JUROR IS OPPOSED TO CAPITAL PUNISHMENT DOES NOT DISQUALIFY HIM from sitting in a capital case, where he states that he does not think his opinion will interfere with his doing his duty as a juror, although he fears that his views on that subject may influence others of the jury: *Commonwealth v. Webster*, 52 Am. Dec. 711. This question is discussed in the note to *Smith v. Eames*, 36 Id. 532, where the principal case is cited.

JURY ARE JUDGES OF BOTH LAW AND FACT IN CRIMINAL CASES: *Keener v. State*, 63 Am. Dec. 269, and note.

INSTRUCTIONS IN CRIMINAL CASES: See *State v. Chandler*, 52 Am. Dec. 599, note.

COMPETENCY OF JUROR.—The principal case has been cited a number of times by the supreme court of Mississippi while discussing this question. It was cited in *Smith v. State*, 55 Miss. 410, where the court decided that it was error to exclude a juror who answered that he "would not like for a man to be hung," as this was not a sufficient showing of conscientious scruples. It is cited to the point that after a juror has been sworn and taken his seat, if it be discovered that he is incompetent to serve, the court, in the exercise of a sound discretion, may set him aside at any time before evidence is given, in *McGuire v. State*, 37 Id. 378, and *Gilliam v. Brown*, 43 Id. 652; and in *Alfred v. State*, 37 Id. 296-316, to the point that an opinion formed from rumor, so fixed as to require testimony to remove it, constitutes such bias as to render the juror not "impartial," and consequently, under the constitution, to disqualify him for service. It is also cited, generally, to the point that the rule against the qualifications of jurors who have formed an opinion in relation to the matter in controversy has been applied with great rigor in Mississippi, in *Brown v. State*, 57 Id. 431; *Chase v. State*, 46 Id. 699; *White v. State*, 53 Id. 222.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

MORGAN v. COX.

[22 MISSOURI, 373.]

ANY NEGLIGENCE IN EXERCISE OF RIGHT WHICH CAUSES LOSS TO ANOTHER is an injury which confers upon him a right of action.

ONE WHO DOES WHAT IS MORE THAN ORDINARILY DANGEROUS to another is bound to use more than ordinary care where the parties stand in no particular relation to each other.

IN ACTION FOR KILLING ANOTHER'S SLAVE BY NEGLIGENT HANDLING OF LOADED GUN, it is no defense that the act occurred through misadventure and without the defendant's intending it, but the defendant must show that the injury was inevitable and utterly without his fault.

ERROR to St. Clair circuit court. The opinion states the case.

F. P. Wright, for the plaintiff in error.

Gardenhire, for the defendant in error.

By Court, **LEONARD, J.** We see no grounds for disturbing this judgment. The suit was for the negligent shooting of the plaintiff's slave, and the only question was as to the fact of negligence. The defendant, it seems, had been out with his gun, and was asked by the plaintiff to aid him and his servant in driving an unruly cow across the Osage river; and while doing so, he punched the cow with his loaded gun, and in replacing it across his horse the hammer struck the saddle, as he supposed, and caused it to fire, by which the plaintiff's servant was shot and killed.

The court directed the jury that if the killing, although unintentional, was occasioned by the negligence of the defendant, he was liable; and also instructed, at the instance of the defend-

ant, that if the gun were discharged while the defendant was replacing it across his horse, he was not liable, unless the firing was occasioned by his negligence in replacing it; but refused to tell the jury that if it were thus discharged, and not while it was being used in punching the cow, the fact of its having been thus used did not render the defendant liable.

We think the jury were so instructed, as to the law of the case, as to leave the defendant without any ground of complaint; indeed, the matter was submitted to the jury quite as favorably for him as the law would permit. The plaintiff put his right of recovery upon the ground of negligence, and the jury were told that if it appeared from the evidence that the defendant had been guilty of it, they must find for the plaintiff; and ordinarily this would seem to be a sufficient direction that they could not so find unless the proof satisfied them of the required fact. Here, however, the court, at the instance of the defendant, also directed that if the accident occurred while the gun was being replaced across the horse, they must find for the defendant, unless the act was done negligently and without taking proper care. The refused instruction, as to the effect of the previous act of punching the cow upon the subsequent firing, was quite unnecessary for the defendant, except to lead the jury astray; for the court had already said that if the event occurred while the gun was being replaced, the defendant was not liable, unless he were guilty of negligence in replacing it, which was going to the very limit of the law in that particular for the defendant.

We are also satisfied that there was quite enough evidence of negligence to submit the case to the jury; and if we were called upon to express an opinion upon it, we should not hesitate to say that it well warranted the verdict. If a person be guilty of an unlawful act, he is responsible for all the damage that is thereby occasioned to others. But here it is true the defendant had an undoubted right to carry his loaded gun about with him; and therefore that alone did not render him responsible for the private damage that resulted from it to the plaintiff, or answerable criminally for the destruction of human life that was thereby occasioned. Upon legal principles, it must be that to the extent to which one person has a right to act, others, of course, are bound to suffer; and any damage that may accrue to them while he is thus exercising his rights affords no valid ground of complaint. The loss occasioned in such cases is *damnum absque injuria*. Every person, however, who is performing an act is bound to take some care in what he is doing. He cannot

exercise his own indisputable rights without observing proper precaution not to cause others more damage than can be deemed fairly incident to such exercise. *Sic utere tuo, ut alienum non lædas*. And therefore, although the mere exercise of a right is not a wrong in any case, any negligence in the exercise of it that causes a loss to another is an injury, conferring upon him a right of action. It is correctly said that generally, between persons standing in no particular relation to each other, that alone is reasonable care which in the judgment of men in general is proportionate to the probability of injury to others; and consequently, he who does what is more than ordinarily dangerous is bound to use more than ordinary care. The defendant here had a dangerous instrument in his hands, and it was his duty to take proportionate care in handling it. The punching of the cow was a careless use of it, surrounded as he was by others, and although the accident did not then occur, it was no doubt occasioned by accidentally striking the hammer against the saddle, upon returning the gun to the horizontal position which the defendant had carried it without elevating the muzzle. The accident, in all probability, would not have occurred had the defendant taken that care of the gun that it was his duty to have taken of it while it was loaded, and he himself was surrounded by those whom it might injure if it accidentally fired.

We have thus stated how far a party ought to be held responsible upon the principles of law applicable generally to damage occasioned by negligence, which seems to be the ground upon which the plaintiff here placed his right of recovering. It must, however, be admitted that our law holds a person to a much stricter responsibility when the act amounts to a trespass *vi et armis*, either to property or person. Under the old system of actions, it was no defense in such cases that the act occurred by misadventure, and without the wrong-doer's intending it, but the defendant must have shown such circumstances as would make it appear to the court that the injury done to the plaintiff was inevitable, and the defendant was not chargeable with any negligence; for no man should be excused of a trespass unless it may be adjudged utterly without his fault. This was so determined in an old case, *Weaver v. Ward*, Hob. 134, where the action was against a soldier who had accidentally shot his comrade while exercising; and in *Underwood v. Hewson*, Stra. 596, the defendant was uncocking his gun, when it went off, and accidentally wounded a by-stander, and the defendant was charged and holden liable in trespass. And in *Cole v. Fisher*,

11 Mass. 187, it is said that this decision has never been questioned.

The facts of the present case would, under the former system of procedure, have supported an action of trespass, and cannot, we think, be distinguished from the cases cited. In one of them the party in uncocking his gun accidentally discharged it and wounded a by-stander. Here the defendant accidentally struck the hammer of his gun against his saddle, and the same result ensued. In both cases it was upon the defendants to show that it happened, as the books say, by inevitable accident, and without the least fault; and the change that has been introduced by the new code in the remedy has not changed the rules of law as to the liability of the parties. It is enough, however, that under any view of the law the defendant was clearly liable for this damage. In the case cited from the Massachusetts reports, the defendant, after washing his gun, went to his shop door, which was about a rod distant from the highway, and discharged it for the purpose of drying it; and the plaintiff's horse, being at the time harnessed to his chaise, and fastened by his bridle to the fence on the opposite side of the road, was frightened and ran away, and broke the chaise, and the defendant was held answerable for the damage, either in trespass or case, according to the other circumstances of the transaction. In *Lynch v. Nurdin*, 2 Steph. N. P. 1017, which was an action for an injury to a child, committed by the defendant in leaving his horse and cart standing alone in a street, into which some children had got, and teasing the horse, the cart went over the plaintiff and broke his leg; Durham, C. J., before whom the case was tried, held the defendant liable, and said: "If a man were guilty of negligence in leaving anything dangerous in a street, and an injury arose, though partly by the conduct of other parties, the sufferer unquestionably had a right to recover. If a gamekeeper, returning home from his duty, were to leave his loaded gun in a play-ground, and one of the boys should fire it off and injure another, it could not be doubted but that the gamekeeper must answer in damages to the injured party." I recollect, myself, a case that occurred, where a person in riding through the streets of one of our villages with his loaded rifle before him, lying horizontally across his saddle, it accidentally fired and wounded a person sitting in his own door, and no doubt seemed to be entertained of the responsibility of the party for the damage that resulted.

The judgment is affirmed.

REPARATION MUST BE MADE BY PERSON DOING LAWFUL ACT, if damage thereby befall another, where such damage might have been avoided by the exercise of reasonable and proper care by the person doing such act: *Kerwacker v. Cleveland etc. R. R. Co.*, 62 Am. Dec. 246. But if the injury results from an inevitable accident, without any blame or default on the part of the defendant, no action will lie against him: *Miller v. Martin*, 57 Id. 242, note 246, where other cases are collected. An action lies for injury caused to another by want of due caution, without any regard to the intent with which the injury was done: *Id.*

THE PRINCIPAL CASE IS CITED in *Conway v. Reed*, 66 Mo. 355, in support of the proposition that in an action for an intentional trespass, when the injury is proved to have been inflicted by the defendant, and nothing more, the case is made out, and the defendant must prove, in exoneration, that he was not chargeable with negligence, or by way of mitigation; that it was accidental and not intentional, although negligent.

WELLS v. CITY OF WESTON.

[33 MISSOURI, 284.]

LEGISLATURE CANNOT AUTHORIZE MUNICIPAL CORPORATION TO TAX, for its own local purposes, lands lying beyond the corporate limits.

APPEAL from Weston court of common pleas. The opinion states the case.

Abell, Stringfellow, and Vories, for the appellant.

Gardenhire, for the respondent.

By Court, LEONARD, J. The question that has been argued before us upon this record, and the only one that we have considered, is, whether it is competent for the legislature to confer upon the city of Weston authority to tax, for local purposes, land lying beyond the corporate limits. We have considered the matter with all the care that it is our duty to do when we are required to decide upon the constitutional validity of a legislative act; but being clearly of opinion that this provision of the charter violates the constitutional rights of the citizen, which we are bound to protect, we are constrained to pronounce accordingly. The judgment upon the demurrer will therefore be reversed, and the cause remanded.

As the very purpose of instituting government is the protection of the citizen in his person and property, power to violate these rights would seem to be quite beyond the lawful authority of any government; and certainly the legislative department of this government cannot arbitrarily take the property of one citizen and gave it to another, and of course cannot authorize

others to do so. This is not within the power of any properly constituted government, and our American governments are expressly prohibited from taking private property, even for public use, without compensation to the owner. To justify even such an invasion of private property, it must be shown that the use for which it is about to be taken is a public one, and that the compensation to be given has been sufficiently secured to the party; and certainly, from the very purpose of all just governments, and this express provision in our own constitution, we may safely imply a constitutional prohibition against the arbitrary taking of private property for private use without any compensation. This, however, seems to be substantially the authority here given; those who live in the town are authorized to exact annually from those who live adjacent to it a certain portion of their property, to be applied, under their own direction, to their own local purposes. And this, we think, cannot be done under our government, which was instituted exclusively for the protection of individual rights, and where private property is expressly protected from any appropriation of it, even to public use, without full compensation to the owner.

It is true, the legislature possess the uncontrolled power of taxation, with the single limitation that "all property subject to taxation shall be taxed in proportion to its value;" and this authority to tax they may undoubtedly delegate to subordinate agencies, such as county tribunals and municipal corporations, to be assessed and applied locally. But here the attempt is to authorize a municipal corporation—charged with the subordinate government of persons and things within its limits, and having, as incident to this, the power to tax these persons and things for local purposes—to impose a tax upon the lands lying beyond its limits; or in other words, arbitrarily, under the mask of a tax, to take annually from those who are without its jurisdiction a certain portion of their property lying within a half-mile of the corporate limits, which, we think, cannot be done. Although it be true, as a general proposition, that the legislature cannot delegate their legislative power, but must exercise it themselves, under their appropriate responsibilities, yet the practice of creating municipal corporations—with subordinate legislative power over the local affairs of the inhabitants, and, as incident to this, with authority to impose taxes upon the persons and things within the local jurisdiction, in order to supply the local necessities—being firmly established, and daily practiced by our

American governments when our constitution was adopted, must be considered as an ordinary legislative power, and one, of course, that our legislature may lawfully exercise. But no instance, it is believed, can be found where these corporations have been clothed with power to tax others not within their local jurisdiction, for their own local purposes; and if the legislature possess the power now claimed over private property, they ought to exercise it themselves, and not delegate it to those whose interest it is to abuse it.

It may be often difficult to draw the line between a legitimate exercise of the taxing power and the arbitrary seizure of the property of an individual, or of a class of individuals, for local or general purposes under the mask of this power. In *O'heaney v. Hooser*, 9 B. Mon. 380, the question was as to the constitutionality of a law extending the limits of the town of Hopkinstown, for the mere purpose, as the party alleged, of bringing his property within the corporation as a subject of taxation; and the judge who delivered the opinion of the court remarked: "This is not the case of vacant land or of a well-improved farm, occupied by the owner and his family for agricultural purposes, and which, without being required for either streets or houses, or for any other purpose of the town but that of increasing its revenue, is brought within its taxing power by an act extending its limits. Such an act, though on its face simply extending the limits of a town, and presumptively a legitimate exercise of power for that purpose, would in reality, when applied to the facts, be nothing more or less than an authority to the town to tax the land to a certain distance outside of its limits, and in effect, to take the money of the proprietor for its own use without compensation to him." Again, he observed, in reference to some limit in the exercise of legislative discretion in the imposition of taxes: "That limit can only consist in the discrimination to be made between what may with reasonable plausibility be called a tax, and for which it may be assumed that the objects of taxation are regarded by the legislature as forming a just compensation, and that which is palpably not a tax, but is under the form of a tax, or some other form, the taking of private property for the use of others or of the public without compensation. The case must be one in which the operation of the power will be, at first blush, pronounced to be the taking of private property without compensation, and in which it is apparent that the burden is imposed without any view to the interest of the individual in the objects to be accomplished by it. If it be

so, no matter under what form the power is professedly exercised—whether it is in the form of laying or authorizing a tax, or in the regulation of local divisions or boundaries, which result in a subjection to local taxes; and whether the operation be to appropriate the property of one or more individuals without their consent, to the use of the general or local public, or to the use of other private individuals, or of a single individual—the case must be regarded as coming within the prohibition contained in this clause, or the constitution is impotent for the protection of individual rights of property from any aggression, however flagrant, which may be made upon them, provided it be done under color of some recognized power.”

Without, however, expressing any opinion upon imaginary cases, it is sufficient, for the decision of the case now before us, that the legislature cannot authorize a municipal corporation to tax for its own local purposes lands lying beyond the corporate limits; and upon this principle, the judgment of the circuit court is reversed and the cause remanded.

JURISDICTION OF COUNTY TO TAX REAL ESTATE does not extend beyond its own limits: *Sangamon & M. R. R. Co. v. Morgan Co.*, 56 Am. Dec. 497; *State v. Leffingwell*, 54 Mo. 474, citing the principal case.

THE PRINCIPAL CASE IS CITED in *St. Charles v. Nolle*, 51 Mo. 125, and in *St. Louis v. Allen*, 53 Id. 55, to the point that the legislature cannot take the property of one person and give it to another; in *State v. County Court of St. Louis Co.*, 34 Id. 553, to the point that whatever may be done by a city or county is the act of the legislature through that agency; and in *People v. Salem*, 20 Mich. 474, to the point that if a tax is imposed upon one of the municipal subdivisions of the state only, the purpose must not only be a public purpose, as regards the people of that subdivision, but it must also be local.

GOODE v. GOODE.

[22 MISSOURI, 518.]

COURT OF EQUITY HAS NO POWER TO REFORM WILL by correcting a mistake therein made by the draughtsman in drawing it.

APPEAL from Franklin circuit court. The opinion states the case.

T. Polk, Frissell, and C. Jones, for the appellants.

Stevenson and Johnson, for the respondents.

By Court, RYLAND, J. Some time in April, 1855, John Goode died in Franklin county, having previously made his last will,

with a codicil thereto. This will and codicil were admitted to probate about the last of April, 1855; and this petition is brought by some of the legatees of said John Goode to reform the will, so as to make it correspond with the alleged intention of the testator.

To this petition a demurrer was filed, which was sustained by the court below, judgment rendered thereon for defendants, the plaintiffs bring the case here by appeal.

This action is substantially a proceeding to correct a mistake in a will, and we hesitate not to declare that such a proceeding cannot be allowed or sustained; and consequently, that the circuit court decided the case properly, and its judgment must be affirmed.

Adams in his treatise on equity, p. 172, says: "A will cannot be corrected by evidence of mistake, so as to supply a clause or word inadvertently omitted by the drawer or copyer; for there can be no will without the statutory forms, and the disappointed intention has not those forms. But it seems that if a clause be inadvertently introduced, there may be an issue to try whether it is part of the testator's will." Jarman says: "Evidence is not admissible to supply any clause or word which may have been inadvertently omitted by the person drawing or copying the will." 1 Jarman on Wills, 353. In *Mann v. Mann*, 1 Johns. Ch. 231, Chancellor Kent says: "It is a well-settled rule that seems not to stand in need of much proof or illustration, for it runs through all the books, from *Cheyney's Case*, 5 Co. 68, down to this day, that parol evidence cannot be admitted to supply or contradict, enlarge or vary, the words of a will, nor to explain the intention of the testator, except in two specific cases: 1. Where there is a latent ambiguity arising *dehors* the will, as to the person or subject meant to be described; and 2. To rebut a resulting trust—all the cases profess to proceed on one or the other of those grounds."

After citing a list of authorities on the doctrine, he proceeds:

If there be a mistake in the name of the legatee, or there be two legatees of the same name; or if the testator bequeath a particular chattel, and there be two or more of the same description; or if, from any other misdescription of the estate or of the person, there arises a latent ambiguity—it may and must be explained by parol proof, or the will would fall to the ground for uncertainty. When a latent ambiguity is produced, according to the language of the courts—Lord Thurlow, in *Baugh v. Read*, 1 Ves. jun. 259, 261; *Delmare v. Robello*, Id. 415; and Lord

Kenyon, in *Walpole v. Cholmondeley*, 7 T. R. 148—in the only way in which it can be produced, viz., by parol proof, it must be dissolved in the same way; and there is no case for admitting parol evidence to show the intention upon a latent ambiguity on the face of the will. They are all cases of latent ambiguity, and the objection to supply the imperfection of a written will by the testimony of witnesses is founded on the soundest principles of law and policy. 'It would be full of great inconvenience,' say the justices in *Cheyney's Case*, 'that none should know by the written words of a will what construction to make or advice to give, but that it should be controlled by collateral averments out of the will;' and if collateral averments be admitted, to use the words of Sir Mathew Hale, in *Fry v. Porter*, 1 Mod. 300, 'how can there be any certainty? A will may be anything, everything, or nothing. The statute appointed the will to be in writing, to make a certainty; and shall we admit collateral averments and proofs, and make it utterly uncertain?'"

Chancellor Kent says: "Perhaps a solitary *dictum* may occasionally be met with (for there are volumes of cases on the subject of wills, *immensus aliarum super alias cumulus*) in favor of the admission of parol proof to explain an ambiguity or uncertainty appearing on the face of a will; though Lord Thurlow says there is no such case. If there be, we may venture to say it is no authority; the only apology for personal proof in any case is the necessity of the thing, because the ambiguity is so complete as to elude all interpretation, and would destroy the devise altogether unless explained." *Andress v. Weller*, 3 N. J. L. 604, supports the same doctrine.

Judge Story, in his *Equity Jurisprudence*, 1 Story's Eq. Jur., sec. 179, says: "In regard to mistakes in wills, there is no doubt that courts of equity have jurisdiction to correct them when apparent on the face of the will, or are to be made out by construction of its terms; for in cases of wills the intention will prevail. But then the mistake must be apparent on the face of the will, otherwise there can be no relief; for at least, since the statute of frauds, which requires wills to be in writing, whatever may have been the cause before the statute, parol evidence, or evidence *dehors* the will, is not admissible to vary or control the terms of the will, although it is admissible to remove a latent ambiguity."

Parol evidence of the intention of the testator is inadmissible to vary the express terms of a will: *Avery v. Chappel*, 6 Conn. 270 [16 Am. Dec. 53]; *Newburgh v. Newburgh*, 5 Madd. 364.

Apply the universally admitted doctrine of courts of equity to

this case now before us about reforming wills and correcting mistakes in wills, and there will remain no doubt of the correctness of the decision of the court below.

Here the parties (plaintiffs) seek to change a sentence or paragraph of the will of the testator by adding the names of other legatees so as to alter materially the bequests—indeed, seek to cut out one paragraph in effect and set up a new one. Admit this doctrine, and you may as well repeal the statute requiring wills to be in writing, at once. Witnesses will then make wills, and not testators.

Upon the full examination of this case, and the law arising on it, there can be no doubt of the correctness of the judgment of the court below, and it is affirmed by all the judges.

REFORMING AND CORRECTING WILLS IN EQUITY.—It is well established by the authorities that a court of equity will not entertain jurisdiction of a suit brought for the purpose of reforming or correcting a will so as to make it conform to the intention of the testator. Equity has jurisdiction to entertain suits for the reformation of conveyances and agreements, but it has no analogous jurisdiction for the correction or reformation of wills: *Newburgh v. Newburgh*, 5 Madd. 364; *Box v. Barrett*, L. R. 3 Eq. 244; 1 Story's Eq. Jur., sec. 180 a; Pomeroy's Eq. Jur., sec. 871; *Adams' Eq.* 172; *Machem v. Machem*, 28 Ala. 374; *Dunham v. Averill*, 45 Conn. 61; *Hill v. Felton*, 47 Ga. 455; *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674; S. C., 14 Am. Rep. 538; *Jackson v. Payne*, 2 Mete. (Ky.) 567; *Trexler v. Miller*, 1 Ired. Eq. 248; *Yates v. Cole*, 1 Jones Eq. 110; S. C., 59 Am. Dec. 602; *Aller's Appeal*, 67 Pa. St. 341; S. C., 5 Am. Rep. 433; *Hunt v. White*, 24 Tex. 652; *Sherwood v. Sherwood*, 45 Wis. 357; S. C., 30 Am. Rep. 757. In the case of *Newburgh v. Newburgh*, *supra*, the vice-chancellor said: "The court could not for that reason set up the intention of the testator, which by mistake he had been prevented from carrying into execution, as if he had actually executed that intention in the forms prescribed by the statute of frauds. To assume such a jurisdiction would, in effect, be to repeal the statute of frauds in all cases where a deviser failed to comply with the statute of frauds by mistake or accident, and to operate this repeal by admitting parol evidence of the intention of the deviser, which it was the very object of the statute to avoid." And Lord Romilly, M. R., in *Box v. Barrett*, L. R. 3 Eq. 244, said: "Because the testator has made a mistake, you cannot afterwards remodel the will and make it that which you suppose he intended, and as he would have drawn it if he had known the incorrectness of his supposition." In 1 Story's Eq. Jur., supplemental section 180 a, written by Judge Redfield, it is said: "It will be found upon examination that the American courts of equity have not interfered to correct alleged mistakes in the execution of wills, either as to the statutory requisites or the manner of writing, as by inserting the name of another legatee in lieu of one which had been written by the mistake of the scrivener, or applying a devise or bequest to a subject-matter intended by the testator, but not fully expressed." See also 1 Redf. on Wills, 571. Professor Pomeroy says: "There is, of course, no power to reform wills." 2 Pomeroy's Eq. Jur., sec. 871. And in a note to the same section he adds: "There is no jurisdiction of equity to entertain suits for the reformation of wills analo-

gous to that for the reformation of conveyances, agreements, and the like. The power to correct mistakes in wills is simply a part of the more general function of construction and interpretation, and may be exercised, if at all, in administration suits, or in any other suits wherein the rights of parties under the will are adjudicated. In many of the states it would be exercised by courts having a probate jurisdiction in the proceedings for the final settlement and distribution of the estate. However exercised, the power only exists within very narrow limits." The only case we have been able to find in which the court has assumed to correct a will by changing the name of a devisee named therein is the case of *Wood v. White*, 32 Me. 340; S. C., 52 Am. Dec. 654. In that case the will was reformed by changing the name "J. Wood" to "George Wood," in order to carry out the alleged intention of the testator. Lyon, J., delivering the opinion of the court in *Sherwood v. Sherwood*, 45 Wis. 357, S. C., 30 Am. Rep. 757, referring to *Wood v. White*, *supra*, said: "The case was probably a proper one for construing the will as containing a legacy to George Wood; but the decision is of little value as authority for reforming wills." But notwithstanding the case of *Wood v. White*, *supra*, it is very doubtful if a court of equity would entertain a bill brought directly for the purpose of reforming or correcting a mistake in a will unless both the mistake and the means of correcting it are clearly apparent on the face of the will. Wheeler, C. J., discussing this question in delivering the opinion of the court in *Hunt v. White*, 24 Tex. 652, said: "There is no mistake apparent on the face of the will in this case; none that can be made out by a due construction of its terms; and it manifestly is not a case for relief in equity on the ground of mistake or accident. The will is complete in itself and formal in its execution. What is proposed by the parol evidence is to add to the will an independent substantive bequest, and to make it speak upon a subject on which it is altogether silent. It is not proposed to call in extrinsic evidence to enable the court to arrive at the meaning of the testator's language used in the will itself, but to introduce into the will an intention not apparent upon its face, and different from that which the language used imports, by the proof of other language not contained in the will; in effect, to make a new devise for the testator, which he is supposed to have omitted, and not quite consistent with that he has made. The effect of the admission of such evidence would be that the will, though made and executed with the requisite legal solemnities by the testator in his life-time, would really and in fact be made by the witnesses after his death. It is unnecessary to advert to the danger of admitting such evidence. It is sufficient that there is no authority for it in the law; that it would destroy all the guards intended to be secured by the statute of frauds, and the statute concerning wills, for the prevention of frauds and perjuries; and would contravene the clearest and best-established principles and rules of law.

But if the mistake in the will is apparent upon the face of the will, and the court is able, by a due construction of its terms, to ascertain the means of correcting the mistake, a court of equity will correct such mistake when called upon to construe the will or to determine the rights of parties claiming under its provisions: 1 Story's Eq. Jur., sec. 179; 2 Pomeroy's Eq. Jur., sec. 871; 1 Redf. on Wills, 3d ed., 500; Kerr on Fraud and Mistake, Am. ed. by Bump, 448; *Wilson v. Morley*, L. R. 5 Ch. Div. 776; *Mellish v. Mellish*, 4 Ves. 45; *Jackson v. Payne*, 2 Metc. (Ky.) 567; *Nutt v. Nutt*, 1 Freem. Ch. 128; *Hunt v. White*, 24 Tex. 643. To justify the granting of relief in equity, the mistake must, however, be clear, and demonstrable from the scope and structure of the will: 1 Story's Eq. Jur., sec. 180; Kerr on Fraud and Mistake,

449. The jurisdiction of courts of equity to correct errors and mistakes in wills is exercised with great caution: 2 Roper on Legacies, 1456. Sir Richard Pepper Arden, M. R., in *Mellish v. Mellish*, 4 Ves. 45, 49, said: "The question is, Can I see sufficient to enable me to declare that demonstrably and incontrovertibly the name of 'Ann' has crept in by mere mistake? I really believe it was so; but I dare not as a judge take upon myself to say this word cannot be reconciled with the rest of the will; and I always understood that where there is a mistake or an omission, all the court has to do is to see whether it is possible to reconcile that part with the rest, and whether it is perfectly clear, upon the whole scope of the will, that the intention cannot stand with the alleged mistake or omission." A court of equity will not supply blanks in a will where it is not clear from the rest of the instrument what the testator meant to have inserted in such blanks: *Taylor v. Richardson*, 2 Drew, 16; *Trexler v. Miller*, 1 Ired. Eq. 248. In the construction of wills, courts of equity sometimes correct mistakes which are apparent upon the face of the will, and where the means of correction are afforded by the instrument itself, by—

1. *Rejecting Words* that are unmeaning or inconsistent with other parts of the will: *Hugo v. Williams*, L. R. 14 Eq. 224; *Campbell v. Bouskell*, 27 Beav. 325; *Coryton v. Helyar*, 2 Cox, 340; *Doe v. Stenlake*, 12 East, 515.

2. *Supplying Words* omitted through inadvertence. To justify the supplying of words or clauses in a will, it must very clearly appear, not only that there has been an omission, but also what is the exact word or clause that should be supplied: *Shepard v. Lessingham*, Ambl. 122; *Spalding v. Spalding*, Cro. Car. 185; *Kirkpatrick v. Kirkpatrick*, 13 Ves. 476; *Radford v. Radford*, 1 Keen, 483; *Kellogg v. Miz*, 37 Conn. 243; *Hanman v. Thomas*, 44 Md. 30; *Graham v. Graham*, 23 W. Va. 36; S. C., 48 Am. Rep. 364. But where a testator requested his executors to sell "the following-described land," and left out the description, it was held that evidence that he owned a parcel of land not specifically disposed of was not admissible for the purpose of supplying the missing description: *Crooks v. Whitford*, 47 Mich. 283.

3. *Transposing Words* or clauses, when the immediate context or the general scheme of the will demands the transposition: *Marshall v. Hopkins*, 15 East, 309; *Mosley v. Massey*, 8 Id. 149; *Hart v. Tulk*, 2 De G. M. & G. 300; *Graham v. Graham*, 23 W. Va. 36; S. C., 48 Am. Rep. 364. But a transposition of the language of a will can only be justified when it is necessary to give effect to the meaning and purpose of the testator: *Latham v. Latham*, 30 Iowa, 294. The transposition of the words of a will cannot be allowed when the words, just as they stand, have a manifest meaning, and express a clear and intelligible idea; such transposition is permissible only when the language is senseless or contradictory: *Succession of McAuley*, 29 La. Ann. 33.

4. *Changing One Word to Another*.—Thus "and" is sometimes construed to mean "or": *Maynard v. Wright*, 26 Beav. 285; *Hetherington v. Oakman*, 2 Yon. & Coll. C. C. 299; and "or" sometimes construed "and": *Miles v. Dyer*, 5 Sim. 435; *Greated v. Greated*, 26 Beav. 621. But in the following cases the court declined to read "and" as "or": *In re Sanders' Trusts*, L. R. 1 Eq. 675; *In re Kirkbride's Trusts*, 2 Id. 400; *Lecombe v. Edwards*, 28 Beav. 440. In the case of *Du Bois v. Ray*, 35 N. Y. 162, the words "may leave" were treated as though changed to "may have," where such change was regarded as necessary to carry out the intention of the testator, made manifest by the other parts of the will.

PAROL OR EXTRINSIC EVIDENCE is not admissible for the purpose of varying, controlling, contradicting, or even explaining the terms of a will, except

in cases of latent ambiguity: 1 Story's Eq. Jur., sec. 179; 2 Pomeroy's Eq. Jur., sec. 1036; 1 Redf. on Wills, 3d ed., 498; 1 Jarman on Wills, 410; *Mellish v. Mellish*, 4 Ves. 45; *Miller v. Travers*, 8 Bing. 244; *In re The Clergy Society*, 2 Kay & J. 615; *Airl's Estate*, L. R. 12 Ch. Div. 291; *Barber v. Wood*, L. R. 4 Ch. Div. 885; *Chappel v. Avery*, 6 Conn. 31; *Kurtz v. Hibner*, 55 Ill. 514; S. C., 8 Am. Rep. 665; *McAlister v. Butterfield*, 31 Ind. 25; *Judy v. Gilbert*, 77 Id. 96; S. C., 40 Am. Rep. 289; *Fitzpatrick v. Fitzpatrick*, 38 Iowa, 674; S. C., 14 Am. Rep. 538; *Jackson v. Payne*, 2 Meta. (Ky.) 567; *Caldwell v. Caldwell*, 7 Bush, 515; *Cotton v. Smithwick*, 66 Me. 360; *Gilliam v. Brown*, 43 Miss. 641; *Vreeland v. Williams*, 32 N. J. Eq. 734; *Griscom v. Evens*, 40 N. J. L. 402; *Mann v. Mann*, 1 Johns. Ch. 231; *Clark v. Clark*, 2 Lea, 723; *Horton v. Thompson*, 3 Tenn. Ch. 575. Nor is such evidence admissible to show that the testator intended to make a particular bequest but failed to do so through mistake or inadvertence. The disappointed intention of the testator cannot be set up by parol or extrinsic evidence: *Newburgh v. Newburgh*, 5 Madd. 364; *In re Ingle's Trusts*, L. R. 11 Eq. Cas. 578; *Farver v. St. Catharine's College*, L. R. 16 Eq. Cas. 19; *Patch v. White*, 1 Mackey (D. C.), 468; *Hill v. Felton*, 47 Ga. 455; *Jackson v. Payne*, 2 Meta. (Ky.) 567; *Hawman v. Thomas*, 44 Md. 30; *Appel v. Byers*, 98 Pa. St. 479; *Skipwith v. Cabell*, 19 Gratt. 758. In the case of *Patch v. White*, *supra*, the testator bequeathed lot 6 in square 403; he did not own that lot, but did own lot 3 in square 406. Parol evidence was held inadmissible to show that he intended to devise the latter lot. In the case of *Appel v. Byers*, *supra*, the testator devised property to his nephew A. B., and died leaving two nephews of that name, one legitimate and the other illegitimate. The court decided that parol evidence was inadmissible to show that the testator intended the bequest for his illegitimate, and not for his legitimate, nephew, holding that there was no ambiguity in the will, either latent or patent, and that the legitimate nephew precisely answered the designation and description of the will, while the other person failed, in law, to be a nephew.

Extrinsic evidence is admissible to explain what a testator has written, but not to show what he intended to have written: *Griscom v. Evens*, 40 N. J. L. 402. But parol or extrinsic evidence of the circumstances and surroundings of the testator and of his property is admitted, in order to place the court which expounds the will in the same position in that respect as the testator who made it: *Lord Camoys v. Blandel*, 1 H. L. Cas. 778; *Gilliam v. Chance'lor*, 43 Miss. 437; *Griscom v. Evens*, 40 N. J. L. 402; *Peters v. Porter*, 60 How. Pr. 422; *Jones v. Dove*, 6 Or. 188; S. C., 7 Id. 467; *Hunt v. White*, 24 Tex. 643. So also where a latent ambiguity arises in the language of a will, parol or extrinsic evidence is admitted for the purpose of removing the ambiguity and making clear the intention of the testator: *Beaumont v. Fell*, 2 P. Wms. 141; *Stebbins v. Walkey*, 1 Cox 250; S. C., 2 Bro. C. C. 85; *Morgan v. Morgan*, 1 Comp. & M. 235; *Stringer v. Gardiner*, 4 De G. & J. 468; *Bennett v. Marshall*, 2 Kay & J. 740; *Garvey v. Hibbert*, 19 Ves. 124; *Grant v. Grant*, L. R. 5 C. P. Cas. 727; *McKechnie v. Vaughan*, L. R. 15 Eq. Cas. 289; *Chambers v. Watson*, 60 Iowa, 339; S. C., 46 Am. Rep. 70; *Matter of Cahn*, 3 Redf. 31; *Eatherly v. Eatherly*, 1 Coldw. 461; *Hawkins v. Garland's Adm'r*, 76 Va. 149; S. C., 44 Am. Rep. 158. A latent ambiguity established by evidence *dehors* the will may be removed by the same sort of evidence by which it is raised: *Beaumont v. Fell*, 2 P. Wms. 141; *Hawkins v. Garland's Adm'r*, 76 Va. 149; S. C., 44 Am. Rep. 158. And parol evidence may be admitted to show that a part of the instrument is not the will of the testator: 1 Jarman on Wills, 414; *Newburgh v. Newburgh*, 5 Madd. 364.

MISTAKES IN DESCRIPTIONS IN WILLS.—In reference to misdescriptions in wills, either of the property devised or of the persons to whom it is devised, the maxim, *Falsa demonstratio non nocet*, is applied to prevent a failure of the gift. Where a description consists of two parts, and one of them is accurate and sufficient if it stood alone, this maxim is always applied if the testator had no other property to which such description could apply: *Blague v. Gold*, Cro. Car. 447; *Hastead v. Searle*, 1 Ld. Raym. 728; *Merrick v. Merrick*, 37 Ohio St. 126; S. C., 41 Am. Rep. 493. Miller, J., delivering the opinion of the court in the case of *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674, S. C., 14 Am. Rep. 538, in discussing this subject, said: "If there is no person or no property corresponding to the description in all particulars, but there is one corresponding in many particulars, and no other that can be intended, the false description will be rejected, and the property corresponding to the description in other particulars is held to pass, or the person thus answering the description will take under the will." This principle was also applied in the following cases: *Moseley v. Massey*, 8 East, 149; *Parkin v. Parkin*, 5 Taunt. 321; *Adams v. Jones*, 9 Hare, 485; *West v. Lawday*, 11 H. L. Cas. 375; *In re Nunn's Trusts*, L. R. 19 Eq. 331; *Garland v. Beverly*, L. R. 9 Ch. Div. 213.

COUNTY OF ST. CHARLES v. POWELL.

[22 MISSOURI, 525.]

MAXIM, NULLUM TEMPUS OCCURRIT REGI, APPLIES ONLY TO STATE as large, and not to its political subdivisions.

STATUTE OF LIMITATIONS RUNS AGAINST COUNTY on loan of money made by the county to a private person, although the money loaned had been donated by the state to the county for the purpose of local improvement. And the fact that the borrower was, for a part of the period of limitation, a judge of the county court will not prevent him from setting up the statute of limitations as a defense.

APPEAL from St. Charles circuit court. The suit was brought on the following instrument: "\$175. Twelve months after date, we or either of us promise to pay to the county of St. Charles one hundred and seventy-five dollars, to bear interest at the rate of ten per cent per annum from date till paid, it being for that amount borrowed of the road and canal fund of said county. Witness our hands and seals this fifth day of February, 1841. Ludwell E. Powell (seal). T. Yosti (seal). Wm. Echert (seal)." The petition alleged that the defendant, Powell, was from 1850 to 1854 a justice of the county court of St. Charles county, "and as such, with his associates, had the control and management of all bonds, notes, and evidences of debt due said county, for the use of the road and canal fund." The defendant relied upon the statute of limitations. The court gave judgment for the defendant, on the ground that the debt was barred by the statute.

O. O. Whittlesey and T. Cunningham, for the appellant.

J. Coalter and Alexander, for the respondent.

By Court, LEONARD, J. In 6 Bac. Abr., tit. Prerogative, E, 5, it was said that when a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the king, in such case the king should not be bound, unless the statute is made by express words to extend to him. It is upon this principle that by the English common law statutes of limitations do not apply to actions brought by the crown, unless there be an express provision including it; and Story (*United States v. Hoar*, 2 Mason, 312), after referring to the reason given by Blackstone, 1 Bla. Com. 247, says that the true reason of the king's prerogative, *nullum tempus occurrit regi*, is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss by the negligence of public officers. But whatever the reason of the prerogative may have been, it was originally adopted, it is believed, in all the American states governed by the common law. It seems, however, to have had no place in the Roman law of the prescription of actions, except to enlarge the time within which the public authorities, both general and local, were required to bring their suits: 1 Mackeldey's Civil Law, by Kaufman, 200, 202. The new French code expressly renounces it: Civ. Code, sec. 2227; and our own state has recently done so too: Prac. Act, 1849, art. 2, sec. 10.

The immunity, however, it seems, was, even at common law, an attribute of sovereignty only, and did not belong to the municipal corporations, or other local authorities established to manage the affairs of the political subdivisions of the state. It was so expressly held in *Lessee of the City of Cincinnati v. First Presbyterian Church*, 8 Ohio, 309 [32 Am. Dec. 718], and in *Armstrong v. Dalton*, 4 Dev. L. 569; and we are not aware of any case to the contrary. In *Marion County v. Moffett*, 15 Mo. 604, the omission of a public functionary to do an act required by law for the security of the public interest was not allowed to operate as a release of the security; but the decision had nothing to do with the application of the statute of limitations to cases of that character. The money here sued for belonged to the county, and not to the state at large. It was vested in the county by a legislative donation—impressed, it is true, with a trust for local improvements; but yet it belonged exclusively to the county, although for local, and not for general, purposes.

It is scarcely necessary to remark that the fact that the defendant was a member of the county court during part of the time of the bar is no answer to the statute. If the defendant has been guilty of such conduct, in the discharge of his official duties, as to render him amenable to the law, he must be called to answer in a proper proceeding instituted for that purpose.

The judgment is affirmed. —

MUNICIPAL CORPORATIONS ARE NOT EXEMPT FROM OPERATION OF STATUTE OF LIMITATIONS: See *City of Cincinnati v. First Pres. Church*, 32 Am. Dec. 718, note 719, where this subject is discussed; *City of Alton v. Illinois T. Co.*, 52 Id. 479, note 486, where other cases are collected; *School Directors of St. Charles Township v. Goerges*, 50 Mo. 196, citing the principal case. Property held in trust by bodies politic is as much subject to the statute of limitations as that owned by individuals: *Galloway Co. v. Nolley*, 31 Id. 397, also citing the principal case.

KING OF PRUSSIA v. KUEPPER'S ADMINISTRATOR.

[22 MISSOURI, 550.]

FOREIGN SOVEREIGN MAY SUE IN COURTS OF MISSOURI.

WHERE SUBJECT OF PRUSSIA BECOMES INDEBTED TO HIS SOVEREIGN, by the laws of that kingdom he may be made to answer for such indebtedness in the courts of Missouri.

JURISDICTION IN CAUSES IN WHICH FOREIGN STATES ARE PLAINTIFFS has not been exclusively vested in the federal courts, and hence the state courts may still exercise jurisdiction in all such cases.

ERROR to St. Louis circuit court. The suit was brought by Frederick William IV., king of Prussia, against Felix Coste, administrator of Frederick William Kuepper, deceased. The petition states that the plaintiff is the absolute monarch of the kingdom of Prussia, and as king thereof is the sole government of that country; that he is unrestrained by any constitution or law, and that his will, expressed in due form, is the only law of that country, and is the only legal power there known to exist as law. The plaintiff further says that any money sent through the royal post-office department of that country, or received to be so transmitted by any officer of that department, if lost, stolen, or embezzled, is to be refunded to the proper owners thereof by the plaintiff, and that such was the law on, and long before, the tenth of April, 1849; that said Kuepper was, on and for a long time before the tenth of April, 1849, the plaintiff's servant and post-officer at Wermelskirchen, in the kingdom of Prussia, and as such officer received in his official capacity large sums of money; that on the tenth day of

April, 1849, said Kuepper absconded with seven thousand four hundred German dollars of said money, and embezzled and converted the same to his own use, and secretly fled from said kingdom and came to St. Louis, Missouri, where he died in the summer of 1849, and that letters of administration were duly granted to the defendant, Coste, by the St. Louis probate court, on the thirty-first day of July, 1849. The plaintiff further states that he has, according to the law and custom of his kingdom, duly refunded and paid to the various owners thereof the various sums of money stolen and embezzled from them by said Kuepper, and that he has, according to said law and custom, a just and legal demand against the defendant for the sums of money by him so refunded and paid. The plaintiff further says that the defendant justly owes him said sum of money, and he estimates his damage for said money and interest at the sum of seven thousand dollars, for which last-named sum he prays judgment against the defendant. The defendant demurred to the petition, and the court sustained the demurrer, whereupon the plaintiff sued out a writ of error.

Gibson, for the plaintiff in error.

B. A. Hill and Edward Bates, for the defendant in error.

By Court, SCOTT, J. This case comes up on a demurrer, and raises the question whether a foreign sovereign can sue in our courts. It seems to be now well settled in England that a foreign sovereign can sue in her courts both at law and in equity. In the case of *Hullet & Co. v. King of Spain*, 1 Dow. & C. 175, Lord Redesdale said: "I have no doubt but a foreign sovereign may sue in this country, otherwise there would be a right without a remedy. He sues here on behalf of his subjects, and if foreign sovereigns were not allowed to do that, the refusal might be a cause of war:" *King of Spain v. Machado*, 4 Russ. 225; *King of Spain v. Hullet*, 1 Clark & Fin. 333; *The Colombian Government v. Rothschild*, 1 Sim. 94, 2 Con. Eng. Chan.:

Kings have been allowed to sue in the United States. In the case of the *King of Spain v. Oliver*, 1 Pet. C. C. 217, 276, the suit was entertained without question as to the right of a foreign sovereign to sue. So the case of the *Republic of Mexico v. Arrangois*, 11 How. Pr. 1, was entertained by the courts of New York. In our courts a writ in the name of the state of Indiana was brought and passed through all of them, without any question as to the right to do so: *Tugart v. State of Indiana*, 15 Mo. 209.

If the subjects of foreign governments will contract obligations, or affect themselves with liabilities to their kings or princes, and afterwards migrate to the United States, there is nothing in the nature of our institutions which shields them from their just responsibilities. While our government grants their rights and privileges of citizenship to all foreigners who are naturalized under our laws, there is neither policy nor justice in screening them from the civil liabilities which they have contracted with the government to which they were once subject. Our tribunals afford no assistance in the enforcement of the penal codes of foreign nations, nor would they aid despotic rulers in the exercise of an arbitrary power in making special and retrospective laws affecting foreigners residing here who were once their subjects. But when laws have been made abroad, and debts have been contracted under those laws, there is no reason for refusing our assistance in their collection. Though foreign laws may be enacted by a power and in a way inconsistent with the spirit of our institutions, that is no reason why they should not be enforced against those who have incurred responsibilities in respect of them. Foreign nations have the same right to determine the form of government most conducive to their happiness that we have, and to deny the validity of their laws, because they have not been made in a manner conformable to our notions of government, would be to destroy all comity among nations and introduce endless wars and quarrels. The averments in the petition show that by the laws of Prussia the defendant's intestate was indebted to his sovereign, and he should be made to answer for it.

It was maintained that this suit should have been brought in the courts of the United States, as the constitution of the United States expressly provides "that the judicial power shall extend to all cases between a state or the citizens thereof, and foreign states, citizens, or subjects."

The government of the United States being intrusted with the power of peace and war, it was necessary to invest it with authority to establish tribunals to which foreign states or subjects might resort for injuries sustained by the conduct of those residing within the limits of the United States. For the judgments of tribunals thus established, the United States would be responsible to foreign states. But if they, passing by the courts created by the general government for the redress of grievances they may have sustained at the hands of citizens of the United States, will litigate their rights in courts for whose conduct the

United States are not responsible, if they should be dissatisfied with the measure of justice meted to them by the courts, they have no cause of complaint against the federal government. The ready answer to any remonstrances made on that score would be that there should have been a resort to the tribunals established by the United States. The foreign prince has the right to resort to the courts of the general government; this is a privilege the constitution and laws secure to him; but he may renounce it like any other privilege, and litigate his rights in the state courts.

Whilst commentators on the constitution maintain that it is competent for congress to vest all of the judicial powers of the United States exclusively in tribunals of its own creation, it is nevertheless admitted that this has not been done, and that the state courts, in cases in which they had cognizance before the adoption of the federal constitution, may, concurrently with the courts of the United States, still entertain jurisdiction.

The state courts undoubtedly, before the existence of the federal government, had cognizance of causes in which foreign states were plaintiffs. That jurisdiction remains, unless it has been taken away by the constitution and laws of the United States. The grant of judicial powers by the constitution in some cases is exclusive; in others it is concurrent at the will of congress; that is, congress may make it exclusive or concurrent, as it seems best. In cases in which the state courts had cognizance before the adoption of the constitution of the United States, that jurisdiction remains unless it is taken away. Congress has conformed its action to this principle, and has suffered a portion of the judicial powers of the United States to be exercised by the state courts: 1 Kent's Com., 398; Story's Com., sec. 1784. The jurisdiction, in cases of the character of that under consideration, has not been exclusively vested in the federal courts; hence the state courts may still exercise jurisdiction in all such cases.

With the concurrence of the other judges, the judgment will be reversed and the cause remanded.

CHARLESS v. RANKIN.

[22 MISSOURI, 536.]

COTERMINOUS OWNER OF LAND HAS NO RIGHT TO INCREASED SUPPORT FOR lateral pressure increased by the erection of buildings upon his land, unless he has acquired such a servitude by grant or prescription.

OWNER OF LAND MAKING EXCAVATIONS THEREON IS LIABLE FOR DAMAGE thereby caused to the property of an adjacent owner, if such damage

might have been avoided by the exercise of reasonable care in making the excavations.

OWNER OF LAND MAKING EXCAVATIONS THEREON, BY WHICH ADJACENT OWNER'S BUILDING IS INJURED, is not protected by the fact that he used such care as his builder, who was a skillful and careful person, deemed necessary. The question as to his liability for such injury depends upon whether or not he was negligent in the performance of the work.

PERSON EXCAVATING ON HIS OWN LAND, BY SIDE OF ANOTHER'S BUILDING, is not bound to use such care and caution to prevent injury to such building as a sensible and prudent man, experienced in such work, would exercise if he were the owner of the building. He is bound to use ordinary care to avoid doing harm to his neighbor's building; but the law does not exact from him the same care and expense for the security of his neighbor's property that he may have found it for his interest to have taken for his own.

APPEAL from St. Louis circuit court. The action was brought to recover from the defendant damages alleged to have been sustained by the plaintiff in consequence of the negligent, unskillful, and improper manner in which the defendant made certain excavations upon a lot adjoining that of the plaintiff, which, by undermining the foundations of the plaintiff's building, caused its walls to fall. The answer denied the negligence charged in the petition. The following is the third instruction given by the court, at the plaintiff's request: "3. In excavating by the side of another's building, it is the duty of the person having the excavating done to use such care and caution to prevent injury to such building as a sensible and prudent man, experienced in such work, would exercise if he were the owner of the building; and the omission of such care and caution is culpable negligence, and renders the person having the excavating done liable for all the damages resulting therefrom." The following instructions, asked by the defendant, were refused: "1. If the jury find that the defendant, in excavating his cellar, dug a proper depth, and entirely on his own land, the plaintiff cannot recover; 4. If the jury find from the evidence that defendant had employed a superintendent and architect to oversee and control and manage the erection of his building, and to erect the same, which architect and superintendent was skillful, experienced, careful, and competent to the purpose, and that all the care and precaution that said architect and superintendent judged sufficient to protect plaintiff's wall was used for that purpose, they ought to find for the defendant." The defendant appealed.

T. Polk, for the appellant.

Strong and Drake, for the respondent.

By Court, LEONARD, J. The right to support from the adjoining soil may be claimed either for the land in its natural state, or for it subjected to an artificial pressure by means of building or otherwise.

The right in the former case would seem to be a natural servitude or easement belonging to contiguous lots, and accordingly it was recognized and protected in the Roman law by specified regulations, and similar provisions have been introduced into the civil code of France: Code Civ., art. 614. We are not aware of any express common-law decision upon this subject; but we find it said of old, in Rolle's Abr. 564, tit. Trespass: "It seems that a man who has land closely adjoining my land cannot dig his land so near mine that mine would fall into his pit; and an action brought for such an act would lie;" and in *Wyatt v. Harrison*, 3 Barn. & Adol. 871, Lord Tenterden remarked, in delivering the judgment of the court of king's bench: "It may be true that if my land adjoins that of another, and I have not, by building, increased the weight upon my soil, and my neighbor digs in his land so as to occasion mine to fall in, he may be liable to an action."

When, however, the lateral pressure has been increased by the erection of buildings, it seems to be well settled at common law, by authorities, that no man has a right to an increased support, unless he has acquired such a servitude by grant or prescription. It is so laid down in the early case of *Wilde v. Minsterley*, 2 Roll. Abr. 565. "If A be seised in fee of copyhold land, closely adjoining the land of B, and A erect a new house upon his copyhold land, and any part of his house is erected on the confines of his land adjoining the land of B; if B afterwards dig his land so near to the foundation of the house of A, but not in the land of A, that by it the foundation of the messuage, and the messuage itself, fall into the pit, still no action lies by A against B, inasmuch as it was the fault of A himself that he built his house so near the land of B; for he cannot by his own act prevent B from making the best usage of his land that he can." And Lord Tenterden, in delivering the judgment of the court in the case before cited, said: "The question reduces itself to this: if a person builds to the utmost extremity of his own land, and the owner of the adjoining land digs the ground there so as to remove some part of the soil which formed the support of the building so erected, whether an action lies for the injury thereby occasioned. Whatever the law might be, if the damage complained of were in respect of

an ancient messuage possessed by the plaintiff at the extremity of his own land, which circumstance of contiguity might imply the consent of the adjoining proprietor at a former time to the erection of the building in that situation, it is enough to say in this case that the building is not alleged to be ancient, but may, as far as appears from the declaration, have been recently erected, and if so, then, according to the authorities, the plaintiff is not entitled to recover." In the more recent case of *Partridge v. Scott*, 3 Mee. & W. 220, which involved the same question, it is said: "If a man builds his house at the extremity of his land, he does not thereby acquire any right of easement for support, or otherwise, over the land of his neighbor. He has no right to load his own soil so as to make it require the support of that of his neighbor, unless he has some grant to that effect;" and the American cases are, it is believed, to the same effect: *Thurston v. Hancock*, 12 Mass. 221 [7 Am. Dec. 57].

Although not altogether in good taste, I repeat, as applicable to the present case, what I had occasion to say in a former case. It is a logical consequence from legal principles, that to the extent to which a person has a right to act, others are bound to suffer; and that any damage that may accrue to them, while a person thus exercises his own rights, affords no valid ground of complaint. The loss occasioned in such cases is *damnum absque injuria*. Every person, however, who is performing an act is bound to take some care in what he is doing. He cannot exercise his own indisputable rights without observing proper precaution not to cause others more damage than can be deemed fairly incident to such exercise. In *Walters v. Pfeil*, Moo. & M. 364, the plaintiff had neglected to take any precaution by shoring up their own houses within, or in any other way, against the effect of pulling down the defendant's adjoining house; and it appeared that this might have been so done that the accident would not have happened to the same extent. There was also evidence to show that the accident was owing to the bad foundation of the plaintiff's house; but there was conflicting evidence as to whether, by due care on the part of the defendant's workmen, the mischief might have been entirely avoided. In summing up, the chief justice of the queen's bench stated it to be now settled that the owner of premises adjoining those pulled down must shore up his own in the inside, and do everything proper to be done upon them for their preservation; but although that had not been done, still the omission did not necessarily defeat the action, and that if the pulling down were irregularly and im-

properly done, and an injury were produced thereby, the person so acting would be liable, notwithstanding the omission of the plaintiff; and the jury were accordingly charged that if the defendant's house was pulled down in a wasteful, negligent, and improvident manner, so as to occasion greater risk to the plaintiff than in the ordinary course of doing the work he would have incurred, then the defendant was liable to make compensation for the consequences of his want of caution; but that if they thought fair and proper caution had been exercised, then the defendant would be entitled to a verdict. The result of the cases, we think, is, and such would seem to be the reasonable doctrine, that if a man in the exercise of his own rights of property do damage to his neighbor, he is liable if it might have been avoided by the use of reasonable care; and it seems to be usual in England for a party intending to make alterations that may affect his neighbor's premises to give notice of his intention; but whether any such duty be imposed by law (*Chadwick v. Trower*, 8 Scott, 1) need not be inquired into here, as the present plaintiff knew of the digging, and took measures to protect himself against the consequences of it.

These principles require us, we think, to reverse the judgment, and send the case back for a second trial. We do not think there is any error in the refusal of the defendant's first and fourth instructions. A party may subject himself to responsibility by the want of reasonable care, although his digging be confined to his own ground and do not exceed a reasonable depth; nor is he protected by the fact that he used such care as his builder, who was a skillful and careful person, deemed necessary. The question is, as to the fact of negligence, whether the work were done in a careless and improvident manner, so as to occasion greater risk to the plaintiff than in the reasonable course of doing the work he would have incurred, and not whether, in the opinion of the superintendent, no matter how skillful he may have been, everything was done that he deemed necessary. His opinion may be proper evidence to be considered by the jury, but it does not conclude the matter, constituting of itself a bar to the plaintiff's recovery. But the error is in plaintiff's third instruction, where an attempt is made to define with precision the degree of care that must be used in a case like the present, in order to exempt a party from liability; and the standard there adopted is substantially that care that a prudent man, experienced in such work, would have exercised, if he had been himself the owner of the injured building.

Now, it is quite evident, we think, that this is going beyond the care that the law exacts upon such occasions. It is to be observed that the defendant was upon his own ground, and in digging upon it, exercised an undoubted right of property which the plaintiff had no right, either by express grant or prescription, by statute or local ordinance, in any way to interfere with or prevent; and although, in exercising his rights, it was certainly his duty to his neighbor to use ordinary care in order to avoid doing him harm, he was not bound to observe the same care that he would have taken, as a wise and sensible man, if he had been the owner of both buildings—the one erected and the one about to be erected. He would, of course, in that event, have shored up, and would have submitted to many inconveniences, and indeed, would have incurred considerable additional expense in doing the new work, rather than expose the building already erected to any risk. Every prudent person, in such a situation, would take precautions, subject himself to inconveniences, and forego the exercise of every right that would endanger his present building, if he found it for his interest to do so. In the present case, if the laying of the new foundation in very short sections would have been attended with increased expense and with danger to the sufficiency of the new wall, and the defendant had been the owner of the plaintiff's building, he might have found it for his interest to have submitted, and most probably would have submitted, to this inconvenience and risk, and even increased expense, to avoid all hazard to his own property; yet the law does not exact of him the same forbearance and care and expense for the security of his neighbor's property that he would have found it for his interest to have taken for his own. We do not know that the instruction was intended, or indeed understood by the jury, in the sense we impute to it. It may, however, have been so understood, and if so, could not but have misled them; and we shall therefore reverse the judgment, that the case may be retried upon a fuller understanding of the facts and of the law applicable to them.

The judgment is reversed and the cause remanded.

LATERAL SUPPORT—RIGHT TO SUPPORT OF LAND FROM ADJACENT LAND IS INCIDENT TO OWNERSHIP.—This subject is treated in the note to *Thurston v. Hancock*, 7 Am. Dec. 62-66; see also note to *Richardson v. Vt. Cent. R. Co.*, 60 Id. 289. Additional and later authorities render a fuller treatment possible. The owner of land has a right *ex jure nature* to the support of his soil in its natural condition, by the soil of his adjoining or coterminous

owners. "Every person has a natural right *ex jure nature* to the support to his land from the adjacent or subjacent soil. This natural right is incident to the land, and the owner is as much entitled to it as he is to the land itself, without any grant by the servient owner, or any act of acquisition on his own part. It is a right, therefore, which the law annexes to the ownership of the land, that he shall have sufficient support for his ground from the subjacent and adjacent soil." *Stevenson v. Wallace*, 27 Gratt. 86, 87, *per* Anderson, J.; see also *Panton v. Holland*, 17 Johns. 92; *Farrand v. Marshall*, 19 Barb. 390; S. C., 21 Id. 409; *Thurston v. Hancock*, 12 Mass. 226; S. C., 7 Am. Dec. 57; *Gilmore v. Driscoll*, 122 Mass. 199; S. C., 23 Am. Rep. 312; *Richardson v. Vermont Cent. R. R. Co.*, 25 Vt. 465; S. C., 60 Am. Dec. 283; *Busby v. Holthaus*, 46 Mo. 161. The owner of land has a natural right to the use of it in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lots: *Lasala v. Holbrook*, 4 Paige, 169; S. C., 25 Am. Dec. 524; *Beard v. Murphy*, 37 Vt. 104; *Humphries v. Brogden*, 12 Ad. & El., N. S., 743; see *Wyatt v. Harrison*, 3 Barn. & Adol. 871; *Bibby v. Carter*, 4 H. & N. 153; *McGuire v. Grant*, 25 N. J. L. 356; *Hay v. Cohoes Co.*, 2 N. Y. 162; *Busby v. Holthaus*, 46 Mo. 161; and the principal case. Therefore an adjoining owner, when making excavations, must provide for the support of the soil of neighboring owners, by the construction of walls, bulwarks, or other means, in order that his neighbor's soil may not cave or fall by its own weight into the excavation: Washb. on Real Prop., 4th ed., 359; *Wier's Appeal*, 81* Pa. St. 203. For if in excavating or improving his land such a fall of the adjoining land occurs from its own weight, he infringes his neighbor's right to lateral support, and is liable to him in damages, independent of any question of negligence, and no proof of want of care is required to sustain the plaintiff's action: *Gilmore v. Driscoll*, 122 Mass. 199; S. C., 23 Am. Rep. 312; *Richardson v. Vermont Cent. R. R. Co.*, 25 Vt. 465; S. C., 60 Am. Dec. 283; *McGuire v. Grant*, 25 N. J. L. 356; *Transportation Co. v. Chicago*, 99 U. S. 635; *Wilde v. Ministerley*, 2 Roll. Abr. 565; *Foley v. Wyeth*, 2 Allen, 131; *Baltimore & Potomac R. R. Co. v. Reaney*, 42 Md. 117.

Granting Injunction.—One quarrying on a hillslope will be enjoined from removing the lateral support to his neighbor's land unless he shall protect such land by a substantial stone wall: *Wier's Appeal*, 81* Pa. St. 203. But equity will not enjoin a land-owner from making excavations on his land when no serious injury to the adjoining realty is imminent, and when there is nothing peculiar in the situation and circumstances of such realty: *McMaugh v. Burke*, 12 R. I. 499. An injunction will not be granted on the ground of damage to the complainant's edifice, if he is not entitled to special protection, either by prescription, or by grant from the one making the improvement: *Lasala v. Holbrook*, 4 Paige, 169; S. C., 25 Am. Dec. 524.

Liability of Municipal Corporations in Making Excavations.—A land-owner is entitled to the lateral support of the adjoining land in a public street, and a municipal corporation is liable for damage to such owner's land occasioned by removing such lateral support in grading the street: *Dyer v. City of St. Paul*, 27 Minn. 457, citing *O'Brien v. City of St. Paul*, 25 Id. 331. Herein is involved the question of a city's liability for the natural and necessary consequences of its exercise of its right of grading streets, and the weight of authority is, that for such consequences the city is not liable, though it might become so for the negligent exercise of this power: See note to *Perry v. Worcester*, *ante*, p. 431. In a suit against a city for damages for the unlawful excavations made adjoining the plaintiff's lot, evidence showing what would be the cost of a wall along the line of the plaintiff's lot to protect it from

eaving is admissible; the necessity for such wall being a question for the jury: *Aurora v. Fox*, 78 Ind. 1.

NO NATURAL RIGHT TO SUPPORT OF BUILDING BY ADJACENT LAND.—This natural right of the owner to the support of his land in its natural condition does not extend to the support of any additional weight or structure which he may place or erect thereon. And therefore, if a building or other structure erected on his land is injured or destroyed by excavations of an adjoining owner which are conducted lawfully and with care, and which would not have caused the land itself to have fallen, or have injured it in any way, the injury will be *damnum abque injuria*, and the owner of the building will be without remedy; and he must, in order to protect his building, support it by artificial means. And if his land falls into the adjacent excavation, not by its own weight, but because of the weight of the superstructure, this will be *damnum abque injuria*: *Stevenson v. Wallace*, 27 Gratt. 87; *Dodd v. Holme*, 1 Ad. & El. 493; *Elliot v. North eastern Ry Co.*, 10 H. L. Cas. 333; *Partridge v. Scott*, 3 Mee. & W. 220; *Hide v. Thornborough*, 2 Car. & K. 250; *Smith v. Thackerah*, L. R. 1 C. P. 564; *Gilmore v. Driscoll*, 122 Mass. 199; S. C., 23 Am. Rep. 312; *Thurston v. Hancock*, 12 Mass. 220; S. C., 7 Am. Dec. 57; *Lasala v. Holbrook*, 4 Paige, 169; S. C., 25 Am. Dec. 524; *Napier v. Bulwinkle*, 5 Rich. L. 311, 323; *Wyatt v. Harrison*, 3 Barn. & Adol. 871; *Palmer v. Fleshees*, 1 Sid. 167; *Gayford v. Nicholls*, 9 Exch. 702; *Rogers v. Taylor*, 2 H. & N. 828, 834; *Busby v. Holthaus*, 46 Mo. 161; *McGuire v. Grant*, 25 N. J. L. 356. It is not the duty of the person excavating on his own land to support the buildings of adjoining owners: *Aston v. Nolan*, 63 Cal. 269; *McMullen v. Watt*, 27 Ohio St. 306.

DAMAGES.—And if any damages are recoverable in such case, they will be the damages to the land itself, not to the buildings, and such damages, too, as are caused by the excavation and not by the weight of the buildings placed upon the soil: *Lasala v. Holbrook*, 4 Paige, 169; S. C., 25 Am. Dec. 524; *Gilmore v. Driscoll*, 122 Mass. 199; S. C., 23 Am. Rep. 312; *Thurston v. Hancock*, 12 Mass. 220; S. C., 7 Am. Dec. 57; *Smith v. Thackerah*, L. R. 1 C. P. 564; *Partridge v. Scott*, 3 Mee. & W. 220; note to *Thurston v. Hancock*, 7 Am. Dec. 65; and the damage to the land must be appreciable or there will be no recovery: *Smith v. Thackerah*, L. R. 1 C. P. 564. The measure of damages for the removal of lateral support is not the cost of restoring the land to its former situation, or of building a wall to support it, but it is the diminution in value of the plaintiff's land by reason of the defendant's acts: *McGuire v. Grant*, 25 N. J. L. 356; see also *Gilmore v. Driscoll*, 122 Mass. 199.

LIABLE FOR INJURIES TO HOUSE CAUSED BY NEGLIGENT EXCAVATION.—Notwithstanding the owner of a building has no natural right to its support by the adjacent soil, yet he will have a right based upon the negligence of the adjoining proprietor in making excavations; and therefore, if the adjacent owner proceeds in his improvements on his own land, and makes his excavation in such a negligent, improper, and unskillful manner as to impair the foundations of the building or injure it, he will be liable. He must exercise reasonable care and diligence, though he is not obliged to support the buildings: *Dodd v. Holme*, 1 Ad. & El. 493; *Panton v. Holland*, 17 Johns. 92; *Shrieve v. Stokes*, 8 B. Mon. 453; S. C., 48 Am. Dec. 401; *McGuire v. Grant*, 25 N. J. L. 356; *Jeffries v. Williams*, 5 Exch. 792; *Peyton v. Mayor of London*, 9 Barn. & Cress. 725; *Baltimore & Potomac R. R. Co. v. Reaney*, 42 Md. 117; see also *Gilmore v. Driscoll*, 122 Mass. 199. But if he uses such care as an ordinarily prudent person would use in making excavations and building his walls, he is

not liable to an adjoining owner whose house is injured thereby: *Dixon v. Wilkinson*, 2 McArthur, 425.

Work Done by Contractor, Owner not Liable for Negligence.—The owner will not be liable for injuries done to a house on an adjacent lot caused by excavations made for building purposes on his own lot when the work is done by a skilled contractor to whom the job has been let, for here the doctrine of *respondent superior* will not apply: *Myer v. Hobbs*, 57 Ala. 175; *Aston v. Nolan*, 63 Cal. 269; *Gayford v. Nicholls*, 9 Exch. 703; *McGuire v. Grant*, 25 N. J. L. 356. But see *Dorrity v. Rapp*, 72 N. Y. 307, where by statute the party causing the excavation to be made was bound to support an adjoining wall, and the owner was held to be such party and not to be relieved from liability for failure to do so from the fact of his having employed a contractor to do the work: See also *Stevenson v. Wallace*, 27 Gratt. 77.

NOTICE TO BE GIVEN TO ADJACENT OWNER OF BUILDING BEFORE EXCAVATION.—The owner of a lot having a building upon it is entitled to notice from the owner of an adjoining lot, who intends to build on the latter, and so improve it as to make it necessary for the security of the former house that it should be shored up and be supported during the progress of the work: *Eno v. Del Vecchio*, 4 Duer, 66; S. C., 6 Id. 17; *Aston v. Nolan*, 63 Cal. 269 (where this is also provided by statute); *Lasala v. Holbrook*, 4 Paige, 169; S. C., 25 Am. Dec. 524; see also *Peyton v. Mayor of London*, 9 Barn. & Cress. 725. But although the adjacent owner has given notice, he is bound nevertheless to exercise reasonable care and skill in improving his lot: Id. The provision of the act of 1855, regulating the excavation of lands by owners in the cities of New York and Brooklyn, which requires such owner, when intending to excavate more than ten feet in depth, to support any wall on adjoining land standing near the boundary line, "if afforded the necessary license to enter on the adjoining land, and not otherwise," does not require the owner of the adjoining land to tender a license in order to receive the benefit of the statute; but it is incumbent upon the party "causing the excavation to be made" to request permission to enter and proceed with the excavation without supporting the wall; and if he fails so to do, he is liable for the damage: *Dorrity v. Rapp*, 72 N. Y. 307.

PRESCRIPTIVE RIGHT TO SUPPORT OF BUILDINGS: See note to *Thurston v. Hancock*, 7 Am. Dec. 63. Though there is no natural right to the support by adjacent land of the weight of structures placed upon land, yet it is the authority of the English courts, and of many American courts, that this right may be acquired by the enjoyment by the building of this support for the period of time requisite to create a prescriptive right: *Humphries v. Brogden*, 12 Ad. & El. N. S., 739; *Hide v. Thornborough*, 2 Car. & K. 250; *Donomi v. Backhouse*, EL B. & E. 622; S. C., 9 H. L. Cas. 503; *Brown v. Windsor*, 1 Crompt. & J. 20; *Stingsby v. Barnard*, 1 Rolle, 430; *Palmer v. Fleshees*, 1 Sid. 167; *Lasala v. Holbrook*, 4 Paige, 169, 173; S. C., 25 Am. Dec. 524; *Stevenson v. Wallace*, 27 Gratt. 77; *Aston v. Nolan*, 63 Cal. 269 (*obiter dictum*); *Richart v. Scott*, 7 Watts, 460; *Hay v. Cohoes Co.*, 2 N. Y. 162. The easement for the support of buildings is acquired by grant, which may be express, implied, or presumed, and when acquired, it gives the same right of support in respect to the buildings that there was *ex jure naturæ* in respect to the land: *Stevenson v. Wallace*, 27 Gratt. 77.

A grant of a house will carry with it the right of support for it by the adjacent land of the grantor: *Stevenson v. Wallace*, 27 Gratt. 77. Still, even where this prescriptive right exists, or would have existed by lapse of time, the owner will have no right to damages where his house is injured when ex-

cavation is made by the adjoining owner, if the house was not in the first place properly constructed, and its injury would not have happened from the excavation but for its defective condition: *Richart v. Scott*, 7 Watts, 400; *Smith v. Hardesty*, 31 Mo. 412.

Conflicting Authority.—This doctrine, that a right to the support of a structure upon land may be acquired by lapse of time, that is, by prescription, is rejected by some of the American courts: *Mitchell v. Mayor*, 49 Ga. 19; S. C., 15 Am. Rep. 669; and see *Gilmore v. Driscoll*, 122 Mass. 199; S. C., 23 Am. Rep. 312; *Napier v. Bulwinkle*, 5 Rich. L. 324. The argument against the right by prescription is very strong. It is, in brief, that the doctrine is the offspring of an analogy to the doctrine of ancient lights, which latter doctrine is not generally in force in this country: *Mitchell v. Mayor*, 49 Ga. 19; S. C., 15 Am. Rep. 669; and that the essential element of a prescriptive right is wanting, since there can be no adverse holding in the case of the owner of the building, since it is on his own property; or against the adjacent owner, since he has no right of entry upon the land of the owner of the building. The argument is more fully presented in the note to *Thurston v. Hancock*, 7 Am. Dec. 63, 64, and in Bennett's *Goddard's Law of Easements*, 231 et seq., where the author perceives a leaning in the English courts toward departing from the doctrine so long established in precedent; and directs particular attention to *Angus v. Dalton*, L. R. 3 Q. B. D. 85, which will be found abstracted in the note to *Thurston v. Hancock*, 7 Am. Dec. 63. See this case on appeal, L. R. 4 Q. B. D. 162.

LATERAL SUPPORT OF WALLS.—An easement of lateral support for the wall of one house against another may be acquired from an implied grant. This is the case where one erects several houses in a block, or so as to require mutual support, and then conveys them to different owners, or where one house is conveyed and the adjoining one retained by the original owner: *Richards v. Rose*, 9 Exch. 218; S. C., 24 Eng. L. & Eq. 406; *Solomon v. Vintners' Co.*, 4 H. & N. 598; *Webster v. Stevens*, 5 Duer, 553; see *Eno v. Del Vecchio*, 4 Id. 53; *Stevenson v. Wallace*, 27 Gratt. 75. But separate owners will not acquire an easement or servitude of the mutual support of adjacent buildings from the mere fact of their juxtaposition, however long continued: *Peyton v. Mayor of London*, 9 Barn. & Cress. 725; *Napier v. Bulwinkle*, 5 Rich. L. 311, 324; see *Chaumiller v. Robinson*, 4 Exch. 170. Still, as between even such adjacent owners one of them will incur liability if he pulls down his house in a wasteful, negligent, or improper manner, and thereby injures the adjoining house: *Walters v. Pfeil*, Moo. & M. 362. But if he give notice, he is not bound to exercise extraordinary care in removing his building in order to prevent injury to the adjoining house: *Massey v. Goyder*, 4 Car. & P. 161.

MCNEILLY v. PATCHIN.

[23 MISSOURI, 40.]

SURETIES BY SUCCESSIVE INDORSEMENTS ON MEROANTILE PAPER are presumed to mean to stand as they have placed themselves; but if there is an agreement between them to become indorsers for the accommodation of the drawer, they are presumed to promise to contribute equally toward any loss which may be occasioned by non-payment.

FIRST INDORSER IS RESPONSIBLE TO EVERY HOLDER, and to every person whose name is on the note subsequent to his own and who has been compelled to pay the amount of the note.

SUCCESSIVE INDORSERS OF ACCOMMODATION PAPER are not joint sureties, in the absence of any understanding or agreement between themselves in regard to the manner of indorsing.

APPEAL from the St. Louis court of common pleas. The opinion states the case.

M. L. Gray, for the appellant.

A. D. Glover, for the respondent.

By Court, RYLAND, J. This was a suit by McNeilly, who was an accommodation indorser, against Patchin, who was also a prior accommodation indorser, to recover the amount paid by him to the holder of the note. Defense was, that the note was executed wholly without consideration, so far as the defendant was concerned; that it was indorsed by plaintiff and defendant in blank as co-securities for Clarkson, and delivered to him to be discounted; that both plaintiff and defendant indorsed the note in blank as co-securities for Clarkson, and not as succession accommodation indorsers; that defendant is not liable to plaintiff at all on the note, or if liable, is only so for contribution; also that there was no notice sufficient to charge indorsers.

There was a trial by the court, and the facts found by the court are substantially as follows: That Clarkson, the maker, applied to Thompson to have him discount a note, to be drawn by him (Clarkson), and indorsed by Patchin, the defendant, a portion of the proceeds of which was to be applied by Thompson to the payment of Clarkson's indebtedness to him. Thompson declined discounting such a note unless the name of the plaintiff was also procured on the note. Thereupon said Clarkson, for whom Patchin had been in the habit of indorsing as accommodation indorser, applied to the defendant Patchin to indorse said note, and stated to said Patchin what had occurred between him and Thompson. The defendant indorsed said note for Clarkson's accommodation; Clarkson also applied to plaintiff to have him indorse the same subsequent to Patchin's indorsement, and stated to the plaintiff that Thompson had agreed to discount such a note. Clarkson was at that time indebted to the plaintiff, and promised the plaintiff if he would so indorse the note that he (Clarkson) would pay to the plaintiff fifty dollars on account of said indebtedness to him. Whether said fifty dollars were to be paid out of the proceeds of the note does not

appear. The solvency and ability of the defendant to pay the note were known to said Clarkson and the plaintiff, and something was said with reference thereto by Clarkson when he applied to the plaintiff to indorse said note. Thereupon the plaintiff put his name on the back of said note, under that of the defendant, who was the payee thereof, and said note was then taken by said Clarkson to Thompson, and was discounted by the latter. The court finds that the note was not paid; was presented for payment, which was refused, and was duly protested; that notice of protest was given, a copy of which was inserted by the court in its finding. Rankin, who was also an indorser, paid the note, and sued the maker, McNeilly and Patchin. The maker, Clarkson, was not served with process, and the suit was dismissed as to him. McNeilly neglected to answer; there was an answer by Patchin, denying due notice of presentment for payment. Judgment by default was taken against McNeilly, and the suit was dismissed as to Patchin. McNeilly paid the amount of the judgment on execution against him, being three hundred and forty dollars and fifty-six cents, on the fifth of January, 1855.

The court finds that at the time said McNeilly put his name on the back of the note he knew that Patchin had previously indorsed the same for the accommodation of Clarkson, and said McNeilly understood the purpose to which said note was to be applied by said Clarkson. There was no understanding or agreement between said Clarkson and the plaintiff, nor between the plaintiff and the defendant Patchin, that the plaintiff was to indorse said note in any other way than as second indorser, or that he was to be co-surety with said Patchin, the defendant. The court below rendered judgment for the plaintiff, and the cause is brought here by appeal on the part of the defendant.

The court below finds that the plaintiff and defendant were successive indorsers without any concert—any understanding or agreement between them in regard to the manner of indorsing; there was nothing to show that the plaintiff was to occupy any other position than as second indorser—nothing that they were to be joint sureties, co-securities for Clarkson.

When two or more persons are sureties for another, the law implies a promise from each to contribute equally towards any loss which may be occasioned thereby. If they become sureties by successive indorsements on mercantile paper, as that is a form of contract which, in general, binds the first to indemnify the second, the law presumes that they mean to stand as they have

placed themselves. But if there was an agreement between them to become indorsers for the accommodation of the drawer, the latter presumption is removed and the original one restored.

The first indorser undertakes that the maker shall pay the note, or that he will pay it, if due diligence be used, for him. This undertaking makes him responsible to every holder, and to every person whose name is on the note subsequent to his own, and who has been compelled to pay the amount.

The defendant contends here that he is not liable, or if liable, he is only so for his portion, as he was a joint surety or a co-security with the plaintiff. If this were so, that is, if he were co-security only, then he would only be liable to contribute. "Co-sureties are bound to contribute equally to pay the debt they have jointly undertaken to pay; but the undertaking must be joint, not separate and successive:" See Chief Justice Marshall's opinion in *McDonald v. Magruder*, 3 Pet. 474. In this case before us McNeilly and Patchin might have become joint indorsers. Their promise might have been a joint promise. In that event each would have been liable to the other for a moiety. But their promise is not joint. They have indorsed separately and successively in the usual mode. No contract, no communication has taken place between them which might vary the legal liabilities these indorsements are known to create. These legal liabilities, therefore, remain in full force.

The supreme court of Ohio, in *Williams v. Bosson*, 11 Ohio, 67, say that the case of *Douglas v. Waddle*, 1 Id. 413 [13 Am. Dec. 630], was decided in 1824. At that time the form of obtaining accommodations from banks was on notes only; upon such notes a local usage obtained, holding the sureties on such paper as joint securities only, and not liable to each other in the order of their coming upon the notes. It is this local rule which is recognized and established as law by the authority of that case. The court in this case, of *Williams v. Bosson*, *supra*, decides that the indorsers of an accommodation bill are not joint sureties, but are liable to each other in the order of their becoming parties.

The cases referred to by the appellant's counsel in Vermont reports show that the law is settled in that state, which holds that one who indorses his name upon a promissory note in blank, he not being payee, is *prima facie* holder as a joint promisor: *Strong v. Riker*, 16 Vt. 554; *Nash v. Skinner*, 12 Id. 219. In *Flint v. Day*, 9 Id. 345, it was held that where a person not a party to a note signs his name on the back, without any words

to express the nature of his undertaking, he is to be considered as a joint promisor with the other signers, and if any of the other signers are merely sureties, he is to be considered as a co-surety with them. Yet in this case the court, in the opinion of Chief Justice Williams, stated: "Indorsers are not co-sureties, but their undertaking is separate and successive." In *McDonald v. Magruder*, 3 Pet. 474, Marshall, C. J., asks the question, "In what does the claim of the second on the first indorser differ from that of the holder on the second indorser? Neither has paid value to his immediate indorser, but the holder has paid value to the maker on the credit of all the names to the instrument. The second indorser, if he takes up the note, has paid value to the holder, in virtue of the liability created by his indorsement. If this liability was founded equally on the credit of the maker and of the first indorser, if his undertaking on the credit of both subjects him to the loss consequent on the payment of the note, how can the contract between him and his immediate indorser be said to be without consideration? We would not wish to be understood as saying that two persons who indorse for a third cannot be considered as joint indorsers or as co-sureties. We have no doubt that any understanding between them to that effect, or any communication between them authorizing the belief that such is to be their liability, as respects themselves, would be sufficient to let the case go to the jury for their decision on the fact whether they were joint sureties, or whether they were to be considered indorsers successively, each responsible according to the place his name occupied on the note. Persons who are willing to assist or to lend their names to another to obtain money can always, if they will, make themselves bear the relation to each other as joint sureties, co-securities, and liable to contribute to any loss in consequence of such use of their names."

But in the absence of any understanding or agreement between them, the simple fact that the note was accommodation paper, and they merely indorsed it, will not make them joint sureties. From the finding of the court, then, in this case, the judgment is correct and must be affirmed, the other judges concurring.

LIABILITY TO CONTRIBUTION OF SUCCESSIVE INDORSERS to one another: See *Daniel v. McRae*, 11 Am. Dec. 787, note 792; *Douglas v. Waddle*, 13 Id. 630, note 634; *Aiken v. Barkley*, 42 Id. 402.

EACH INDORSER HAS RIGHT to look for indemnity to all the indorsers who precede him: *Bank of U. S. v. Beirne*, 42 Am. Dec. 551. Accommodation indorsers are co-sureties: *Pitkin v. Flanagan*, 56 Id. 61, note 63, collecting prior cases; also note to *Aiken v. Barkley*, 42 Id. 402.

SUCCESSIVE ACCOMMODATION INDORSERS upon negotiable paper are not co-sureties as between themselves, unless there is an understanding or agreement between them to that effect: *Druke v. Christy*, 10 Mo. App. 568; *Stillwell v. How*, 46 Id. 591; but are held in the order of their indorsements: *McCune v. Belt*, 45 Id. 178; *Kuntz v. Tempel*, 48 Id. 76, all citing the principal case.

MARTIN v. MICHAEL.

[23 MISSOURI, 80.]

ATTACHING CREDITOR IS NOT ENTITLED TO INJUNCTION, on the ground of fraud, restraining the disposition of his debtor's property in the sheriff's hands under judgments and executions.

APPLICATION for an injunction. W. R. Martin and C. G. Martin were partners, composing the firm of Martin & Brother. The other plaintiffs compose other firms under different names. On the twelfth day of August, 1854, said Martin & Brother commenced suit by attachment to recover a debt due by defendants Samuel and Isaac Michael who composed the firm of S. & I. Michael. Afterwards other suits were commenced by other of the plaintiffs against said S. & I. Michael to recover debts due the other firms. On the eleventh day of August, 1854, said S. & I. Michael confessed judgments for different amounts in favor of their co-defendants, except defendant Wimer, who was then sheriff of St. Louis county. On the same day executions were issued upon said judgments, and levied by said Wimer upon goods belonging to S. & I. Michael. The attachments were levied by the sheriff as they came to his hands respectively upon the same goods seized under said execution. The goods were all the property that said S. & I. Michael owned. The sheriff had advertised and sold the same, and at the time of filing this petition the proceeds of said sales were in his hands. On the eleventh day of August, 1854, S. & I. Michael executed and delivered to H. N. Hart and Joseph Jecks, their co-defendants, a deed of assignment purporting to be a general assignment for the benefit of the creditors of S. & I. Michael. Nothing passed to the assignees by the deed, as the whole property of S. & I. Michael had been seized under the aforesaid executions, and the plaintiffs never assented to the deed. The petition further states that said confession of judgments and deed of assignment were voluntary, fraudulent, without consideration, and made by S. & I. Michael and their co-defendants with the fraudulent intent of hindering and delaying their *bona fide* creditors, and enabling

said S. & I. Michael to obtain money by means of sales under the execution; that S. & I. Michael are insolvent and have no property upon which attachment or execution could be levied, excepting the proceeds of said sales, which are still in the hands of the sheriff. The plaintiffs also alleged that they were without remedy, unless the money in the sheriff's hands can be applied to the payment of the debts due them, and pray that said confessions of judgment be annulled, said executions quashed, that defendants be restrained from collecting and the sheriff from paying the proceeds of the sales to his co-defendants, and also prays for general relief. A temporary injunction issued in conformity with the prayer of the petition. Defendant James Michael for himself alone, and the other defendants jointly, demurred to the petition. Demurrers sustained. Petition dismissed. Plaintiffs appealed.

Krum and Harding, and Biddlecome and B. A. Hill, for the appellants.

S. Reber, for the respondent.

By Court, LEONARD, J. In *Wiggins v. Armstrong*, 2 Johns. Ch. 144, Chancellor Kent said: "This is the case of a creditor on simple contract, after an action commenced at law and before judgment, seeking to control the disposition of the property of his debtor under judgments and executions on the ground of fraud. My first impression was in favor of the plaintiffs, but upon examination I am satisfied that a creditor at large, and before judgment and execution, cannot be entitled to the interference which has been granted in this case. In *Angell v. Draper*, 1 Vern. 399, and *Shirley v. Watts*, 3 Atk. 200, it was held that the creditor must have completed his title at law, by judgment and execution, before he can question the disposition of the debtor's property; and in *Bennett v. Musgrove*, 2 Vern. 51, and in a case before Lord Nottingham, cited in *Batch v. Wastoll*, 1 P. Wms. 445, the same doctrine was declared; and so it is understood by the elementary writers: See Mitford, 115; Coop. Eq. Pl. 149. The reason of the rule seems to be, that until the creditor has established his title he has no right to interfere, and it would lead to an unnecessary and perhaps a fruitless and oppressive interruption to the exercise of the debtor's rights. Unless he has a certain claim upon the property of the debtor, he has no concern with his frauds. On the strength of settled authorities, I shall accordingly grant the motion for dissolving the injunction." Afterwards, in *Wintringham v. Wintringham*, 20

Johns. 296, the same doctrine was recognized and acted upon by the supreme court of New York, and we are not aware of any case, anywhere, in which it has been held otherwise.

An attaching creditor stands on no better ground than one who sues by the ordinary process of the court. The reason of the rule is equally applicable to both classes of cases; and so it was expressly decided in the supreme court of New Jersey, in *Melville v. Brown*, 1 Harr. (N. J.) 367.

Let the judgment stand affirmed.

INJUNCTION AGAINST DEBTOR DISPOSING OF PROPERTY.—Only a judgment creditor can have the assistance of a court of equity to control, prevent, or interfere with the disposition of his debtor's property: *Rhodes v. Cousina*, 18 Am. Dec. 715, note 719; *Scriven v. Bostick*, 16 Id. 664; *Candler v. Pettit*, 19 Id. 399; *Beck v. Burdett*, Id. 436, note 440; *Rice v. Barnard*, 50 Id. 54, cases in note thereto 58, and notes to these cases; see also *Comstock v. Rayford*, 40 Id. 102.

THE PRINCIPAL CASE IS CITED, and the doctrine therein enunciated affirmed, in *Hiney v. Thomas*, 36 Mo. 378; *Turner v. Adams*, 46 Id. 90; *Fisher v. Tallman*, 74 Id. 40; *Crim v. Walker*, 79 Id. 336; *Dodd, Brown & Co. v. Levy*, 10 Mo. App. 122.

KICK v. MERRY.

[23 MISSOURI, 72.]

POLICE OFFICER CANNOT STIPULATE FOR EXTRA COMPENSATION nor take reward for services rendered within the duties of his office, and for which he receives a stated salary.

ACTION to recover upon a contract, whereby defendant agreed to compensate defendant for services in apprehending one G. W. Morrison, charged with the crime of larceny. Plaintiff recovered. Defendant appealed.

S. A. Bennett, for the appellant.

Hart and Jecko, for the respondent.

By Court, Scott, J. This action cannot be maintained. It is a principle of the common law that an officer ought not to take money for doing his duty. Hawkins says: "If once it should be allowed that promises to an officer to pay more for his services than the law allows could sustain an action, the people would quickly be given to understand how kindly they would be taken, and happy would that man be who could have his business well done without them:" 1 Hawk. P. O., c. 68, sec. 4. This is an ancient principle, and it has been steadily adhered to as

being necessary to save the community from extortion and oppression. Once allow an officer to contract for extra compensation for the discharge of his duty, and bribery would become the means by which alone the laws could be executed. Chancellor Kent says that every seaman is bound, from the nature and terms of his contract, to do his duty in the service to the utmost of his ability; and therefore a promise made by a master, when the ship is in distress, to pay extra wages, as an inducement to extraordinary exertion, is illegal and void: 3 Kent's Com. 185. In the case of *Hatch v. Mann*, 15 Wend. 44, the court of errors in New York held that a constable or other ministerial officer, the fees for whose official services are prescribed by law, cannot maintain an action on a promise of extra compensation for extra services, although services beyond what could legally be required are rendered by the officer. In *Mitchell v. Vance*, 5 T. B. Mon. 529 [17 Am. Dec. 96], the court maintained that a bond executed for the purpose of inducing a constable to do that which, by the duties of his office, it was incumbent upon him to do, and as such, was not binding. In the case of *Calligan v. Hallet*, 1 Cai. it was held that a contract with a pilot to assist a vessel in distress, for a certain sum to be paid, is absolutely void. The court observed: "It being made the duty of the pilot to assist the defendant's vessel, it was oppression in them to exact the stipulation in question. It would lead to abuses of the most serious nature if such contracts, formed on such considerations, were held to be legal." The case of *Gilmore v. Lewis*, 12 Ohio, 281, holds: "That it is an indictable offense in public officers to exact and receive anything more for the performance of their legal duty than the fees allowed by statute. A promise to pay them extra compensation is absolutely void. A reward offered for the apprehension of a thief, and the recovery of the money stolen, cannot be claimed by a constable who arrests the thief by virtue of a warrant delivered to him for that purpose." In the case of *Pool v. City of Boston*, 5 Cush. 319, the court decided that "a watchman of the city of Boston who, while in the discharge of his duty as such, discovers a person setting fire to a building, and prosecutes him to conviction, is not entitled to claim a reward offered by the city government for the detection and conviction of an incendiary."

The ordinance regulating the police department of the city of St. Louis, section 21, prescribes that "the members of the department shall not engage in any business which may withdraw their attention from their police service or unfit them for the

duties required of them." The plaintiff was captain of the day-guard. It is made the duty of the privates of the police department to obey punctually, and to the best of their ability, the orders of the captains of the city guard. They are required, to the best of their ability, to preserve order, peace, and quiet throughout the city. The members of the city guard may enter any house, inclosure, or other place, where a breach of the peace, or crime, or breach of ordinance, has been or is being committed, and arrest the offender. The arrest in this case was lawful without a warrant: *State v. Roberts*, 15 Mo. 28. The arrest was lawful by the common law without warrant. Under the circumstances, the officer has no right to insist that he acted as an individual in his private capacity. The case falls within the mischief of the rule of the common law which prohibits an officer from taking a reward as an inducement to do his duty. He received a stated salary for his services. The services rendered were within the duties of his office. All his energies had been devoted to the service of the city. Under such circumstances, to permit an officer to stipulate for extra compensation for services to which the public was entitled would lead to great corruption and oppression in office. It would follow that whenever a crime was committed, instead of speedy efforts for the arrest of the offender, there would be a holding back in the hope that there would be a reward given for his apprehension. If once a habit of taking a reward is introduced, nothing will be done unless the service is previously purchased by extra pay. The other judges concurring, the judgment will be reversed.

DEPUTY SHERIFF MAKING ARREST in the line of his duty is not, as a matter of public policy, entitled to claim a reward offered for such arrest: *Stamper v. Temple*, 44 Am. Dec. 296; and a promise to reward a constable for arresting a criminal is without consideration: *Smith v. Whildin*, 49 Id. 572; *Mitchell v. Vance*, 17 Id. 96.

POLICE OFFICER CANNOT PARTICIPATE IN REWARDS offered for the arrest and conviction of criminals: *Austin v. Supervisors of Milwaukee Co.*, 24 Wis. 279. An agreement to procure the appointment of an administrator is void, as against public policy: *Porter v. Jones*, 52 Mo. 403, both citing the principal case.

DICKSON & GANTT v. DESIRÉ'S ADMINISTRATOR.

[28 MISSOURI, 121.]

STATUTORY WORDS "GRANT, BARGAIN, AND SELL," IN DEED, IMPLY COVENANT OF TITLE RUNNING WITH LAND; and where a defeasible title or possession without any title has passed under such deed, the statutory obligation in respect to the title is one of indemnity, and until damage is sustained by breach of the covenant, inures to the benefit of the party on whom the loss falls.

GENERAL PRINCIPLES OF LAW APPLICABLE TO ACTIONS FOR BREACH OF COVENANT OF WARRANTY or seisin discussed at length.

MEASURE OF DAMAGES IN ACTION FOR BREACH OF COVENANT OF WARRANTY OR SEISIN is the value of the land at the time of the sale, as fixed by the parties to the deed, where the transaction remains between the original parties; but when the original grantee has sold the land to another, and the second purchaser has been evicted, his right of recovery against the first grantor upon the original covenant is limited to the value of the land at the time of his purchase.

IN ACTION FOR BREACH OF COVENANT OF TITLE, it is not necessary for party to show eviction, but he must show an outstanding paramount title which has resulted in some damage to himself, and if he insists that he has extinguished this title, and seeks to recover the cost of it, he must show affirmatively that the price paid was reasonable.

ERROR from St. Louis circuit court. This cause was originally commenced by plaintiffs filing a demand for the sum of five thousand seven hundred and twelve dollars and fifty cents in the probate court of St. Louis against the estate of Jacques Desiré. Said demand was founded upon an alleged breach of statutory covenant of seisin implied from the words "grant, bargain, and sell," in a deed for a certain parcel of land conveyed by Desiré to one Letitia Duncan, from whom plaintiffs claim through intermediate conveyances, as will more fully appear below. Demand allowed by the probate court, and the cause appealed and submitted to the St. Louis circuit court upon an agreed statement of facts, substantially as follows, either party reserving the right to appeal to the supreme court: August 8, 1835, Jacques Desiré, for the consideration of six thousand five hundred dollars, conveyed by deed in fee to Letitia Duncan a certain lot of ground in St. Louis. By said deed Desiré covenanted with said Duncan, her heirs and assigns, that he was seised in fee-simple in said real estate. Letitia Duncan took immediate possession under and by virtue of said deed, and continued in possession thereof until December 16, 1846, at which time all of her right, title, claim, and estate therein was sold by the sheriff of St. Louis county, by virtue of an execution issued on a valid judgment against her, to W. H. Dorsett,

who took immediate possession of said real estate, and continued in possession thereof until May 12, 1855, when heirs of one Emily Chauvin, claiming the said property by title paramount to that of Desiré, by virtue of a judgment in the case of *Chauvin v. Wagner & Dorsett*, reported in 18 Mo. 531, where the same subject-matter was in controversy. Prior to said judgment, Dorsett had conveyed to the plaintiffs in this case, by quit-claim deed, all his interest in said property, and any right of action to him accruing against the estate of Desiré. The plaintiffs, considering the before-mentioned judgment as conclusive of the rights of the litigants, compromised with the heirs of Emily Chauvin and paid the said heirs the sum of five hundred dollars. A petition was filed before the St. Louis land court, in which it was set forth that the plaintiffs were entitled to one moiety, and said heirs to the other moiety, of said land. In pursuance of said petition, an order was made by said court for the sale of said land. At the sale the plaintiffs, Dickson & Gantt, became purchasers, and received the sheriff's deed for said land. Plaintiffs claim, and defendant denies, that the covenant of title made by Desiré to Letitia Duncan passed to Dorsett, and from Dorsett to plaintiffs by the conveyances above recited, as incident to the estate of Letitia Duncan. Also that the seisin of Dorsett, vendee of said Duncan, was defeated by the paramount title of the heirs of Chauvin and the recovery above mentioned. The deed from Desiré to Letitia Duncan is as follows: "This deed, made this eighth day of August, in the year of our Lord one thousand eight hundred and thirty-five, between Jacques Desiré and Pelagie, his wife, grantors of the first part, and Letitia Duncan, grantee of the second part, all of the city and county of St. Louis and state of Missouri, witnesseth, that the said grantors, for and in consideration of the sum of six thousand five hundred dollars to them in hand paid by the said grantee at and before the sealing and delivery thereof, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said Letitia Duncan, her heirs and assigns, a certain lot, piece, or parcel of ground," etc. Judgment in the circuit court for defendant. Exceptions taken, and writ of error to this court.

T. T. Gantt, for the plaintiffs in error.

J. B. Shepley, for the defendant in error.

By Court, LEONARD, J. The question here is as to the capacity of the statute covenant of title, implied from the use of the words "grant, bargain, and sell," to run with the land where the breach complained of is the total want of an estate in fee in the grantor. The possession of the land passed with the deed, and the title of the parties whose claim to the damages is here sought to be enforced is derived from the first grantee through a sheriff's conveyance, made upon an execution sale. It is thus seen that we are to deal with a question that has been the subject of frequent discussion in the courts of justice on both sides of the Atlantic, and upon which it is impossible to reconcile the decisions, not merely of different courts, but of the same courts at different periods of time. We proceed to state what we consider the general principles of law applicable to the subject, and then, applying these principles to the case before us, will state the practical results at which we have arrived.

The sale of a thing imports, from its very nature, an obligation on the part of the seller to secure to the purchaser the possession and enjoyment of the thing bought, the right to possess and enjoy being really that which is purchased. The obligation, therefore, is an incident of the transferred ownership, and goes along with it for its protection; and in order to afford the holder a just compensation when it is disturbed or lost, the benefit of the obligation devolves, of course, upon the successive owners. In this manner it works out the purpose for which it is raised, by holding the original seller, who has the equivalent for the land in his own hands, to his just responsibility, and by yielding the indemnity to the party who has sustained the loss, and is entitled by succession as the last purchaser to the rights of of the preceding proprietors in the same chain of title. This natural warranty of title, however, was not recognized by the common law. It was allowed upon the sale of a personal chattel, where the seller was in possession as the apparent owner; but in reference to real property, the maxim was adopted *caveat emptor*; and in such sales, therefore, a conventional warranty was resorted to in practice, which, attaching itself to the estate conveyed, ran along with the land as an incident to it for the benefit of the successive owners.

The effect of this engagement was to oblige the warrantor to defend the estate to which it was annexed, into whosoever hands it went, which it accomplished by estoppel or rebutter, when the attack came from the warrantor himself, and by a recovery of other lands of equal value upon voucher or *warrantia*

chattel, when the attack came from a stranger; and although this conventional warranty of the common law was considered so entirely an accessory obligation that it could subsist only as an incident to some estate in the land, this produced no inconvenience in the ancient system of conveyancing by feoffment and other similar assurances, which, operating upon the possession, created by their own force estates *de facto* (tortious estates, as they were called), sufficient to support the warranty, and carry it along with the land to all the subsequent successors. In the progress of time, however, other modes of transfer were introduced under the statute of uses, which operated upon the right only; and the present covenants of title superseded in English conveyancing the ancient warranty of the common law, which, yielding a recovery in money instead of land, were for that reason deemed personal covenants. But they also, without distinction, until broken from their own nature and purpose, ran with the land in the same manner as the ancient real warranty. When a breach occurs, however, they are converted into mere rights of action, and these rights are then arrested in the hands of the party who is the owner for the time being, and the action lies where it falls, under the ancient common-law rule that forbids the assignment of these rights.

There seems, however, to be a distinction between the doctrine of the English courts and of some of the leading courts in the United States, as to the character of the breach of a covenant of seisin, that will produce this effect; the former holding that it must be a final complete breach, giving a right of substantial recovery; while in the latter the doctrine seems to be that a mere nominal breach, from which no real damage results, is sufficient to merge the covenant in the right of action, and to deprive it of the capacity of running with the land.

The English doctrine is to be found in the case of *Kingdon v. Nottle*, 4 Mau. & Sel. 53, which was an action by the devisee of the land upon the covenant of seisin in the defendant's conveyance in fee, and it has been followed in Indiana: *Martin v. Baker*, 5 Blackf. 232; and in Ohio: *Backus v. McCoy*, 3 Ohio, 211 [17 Am. Dec. 585]; *Footo v. Burnett*, 10 Id. 817 [36 Am. Dec. 90]; *Devore v. Sunderland*, 17 Id. 55 [49 Am. Dec. 442]; and in reference to the covenant against incumbrances, in South Carolina: *McCrady v. Brisbane*, 1 Nott & M. 104 [9 Am. Dec. 676]; and formerly in Massachusetts: *Prescott v. Trueman*, 4 Mass. 627 [8 Am. Dec. 246]; and *Sprague v. Baker*, 17 Id. 588. But now in Massachusetts, as well as New York and several other

states, the covenant of seisin is considered to be, under all circumstances, a covenant in the present tense, which, if broken at all, is broken at the moment of its creation, and is immediately converted into a mere chose in action, which is incapable of running with the land. The rule seems to be the same, both here and in England, that the breach extinguishes the covenant, and renders it incapable of running with the land; but the difference is in its application—in determining under what circumstances the breach is to be considered as having this effect; the English courts holding that the breach of the covenant of seisin is not final and complete until the right of substantial recovery exists, while in most of the United States this effect is supposed to result from the formal breach, without any regard to the question of damage.

In the English case of *Kingdon v. Nottle*, before referred to, where the possession passed with the deed, Lord Ellenborough remarked that "here the covenant passes with the land to the devisee, and has been broken in the time of the devisee; for so long as the defendant has not a good title, there is a continuing breach; and it is not like a covenant to do an act of solitary performance, but is in the nature of a covenant to do a thing *toties quoties*, as the exigency of the case may require. Here, according to the letter, there has been a breach in the testator's life-time; but according to the spirit, the substantial breach is in the time of the devisee, for she has thereby got the fruit of the covenant in not being able to dispose of the estate."

These observations were severely criticised in *Mitchell v. Warner*, 5 Conn. 497, where it was said by the chief justice: "I affirm that the novel idea attending the breach in the testator's life-time, by calling it a continuing breach, is an ingenious suggestion, but of no substantial import. Every breach of contract is a continuing one until it is in some manner healed; but the great question is, To whom does it continue as a breach? The only answer is, To the person who had the title to the contract when it was first broken. It remains as it was, a breach to the same person who first had a cause of action upon it. If it be anything more, it is not a continuing breach, but a new existence. In the next place, I assert that it is like a covenant to do an act of solitary performance; and for this plain reason, that it is in its nature a covenant for a solitary act, and not for a successive one. It has no analogy to a covenant to do a future act at different times, which may undergo repeated breaches. It cannot be partly broken and partly sound, but the grantor is seised

or not seised, and therefore the covenant is inviolate or violated wholly. I therefore conclude that the judges pronouncing it would have been of an opinion different from the one expressed had they recognized the principle, here well established, that the breach of the covenant of seisin is in its nature total, and the measure of damages the whole consideration paid for the land."

It is thus seen that the real point of difference is, that in England the covenant of seisin is, under some circumstances, a mere covenant of indemnity; but in most of the United States it is always a present covenant, which, if ever broken, must be broken as soon as made, and upon which, of course, only one recovery can be had, the right to which accrues as soon as the covenant is entered into.

The true question would then seem to be, at what time the right of substantial recovery accrues: whether at the moment of the delivery of the deed, or is it postponed, under any circumstances, until the actual damage is sustained? It would seem quite impossible to hold, as we were asked to do in a case before us at the present term, that the cause of action accrues immediately, so as to set the statute of limitations in motion against the party, if we are to hold that during the whole period of its running the party could not have recovered anything more than nominal damages; and it would seem quite unreasonable to say that the party could not have a real recovery upon the mere formal breach because no actual damage has resulted to him from the want of title, and yet afterwards to allow him to recover, not on account of any damage that had accrued to himself, but in respect to the loss that had fallen upon his grantee.

Our course of decision must, if possible, be such as to avoid these difficulties. In *Collier v. Gamble*, 10 Mo. 466, the covenant was created by the statute, and the land had passed and been enjoyed according to the deed, and the breach complained of was a paramount title in a stranger that had not yet been either asserted or extinguished. In the opinion of the court, it is remarked that "the existence of a paramount title, whether it has been asserted or not, is a breach of the statutory covenant; and if for such breach the grantee is permitted to recover the consideration money and interest, he may get both the purchase money and retain possession of the land under a title which is defeasible, but which may in fact never be defeated. In such cases, the reasonable rule is to recover nominal damages only until the estate conveyed is defeated, or the right to defeat

it has been extinguished: *Prescott v. Trueman*, 4 Mass. 627; and *Wyman v. Bollard*, 12 Id. 302. This avoids the manifest injustice of permitting the plaintiff to recover the value of the land, and at the same time retain possession under a title which may never be disturbed, or the defects of which may be remedied by the payment of an inconsiderable sum. It is the rule which prevails in the construction of covenants against incumbrances, and our statutory covenant of seisin is, in fact, a covenant against incumbrances as well as of seisin." And the judgment was, that under the circumstances of the case the party was entitled to a nominal recovery only; and although it was also decided that the covenant did not, in reference to the breach, run with the land, so as to pass the benefit of it to the grantee of the covenantee, yet we may remark that the suit for the use of the last purchaser was in the name of the first grantee, under an express assignment of the right of action; and so the result of the decision, as to the substantial rights of the parties, is not inconsistent with any we shall hold in the present case.

The same doctrine, in reference to the recovery being nominal, seems to have been applied under similar circumstances, not only in the states to which we have already referred, but also in New York: *De la Vergne v. Morris*, 7 Johns. 358 [5 Am. Dec. 281]; in Maine: *Bean v. Mayo*, 5 Me. 94; and Vermont: *Richardson v. Dow*, 5 Vt. 9. The effect of these decisions, we think, is to convert the covenant of seisin, under such circumstances, substantially into a covenant of indemnity against the damage that may result from the want of lawful title; and if so, it leaves the capacity of the covenant to run with the land untouched until the damage has actually resulted to the party. This is the view taken by the courts in Ohio, and accordingly, in *Backus's Adm'r v. McCoy*, 3 Ohio, 216 [17 Am. Dec. 585], the judge who declared the opinion of the court laid down the doctrine that "when the heir or assignee acquires any interest in the land, however small, by even an imperfect or defective title, he shall be entitled to the benefit of all those covenants that concern the realty; and when he has been evicted by paramount title, he is the party damnified by non-performance of the grantor's covenants, and for such may sustain an action. This seems to be reasonable in itself, as well as in accordance with the terms of the covenant. By considering the covenant of seisin as a real covenant attendant upon the inheritance, it will form part of every grantee's security, and make that which otherwise must be either a dead letter or a means of injustice a most useful and

beneficial covenant: a dead letter when an intermediate conveyance has taken place between the making of the covenant and the discovery of defect of title, and the covenantee refuses to bring suit; a means of injustice when, after the covenantee has sold and conveyed without covenants, he brings and sustains an action on the ground that the covenant was broken the moment it was entered into, and could not, therefore, be assigned. When lands are granted in fee by such a conveyance as will pass a fee, and the grantor covenants that he is seised in fee, we can perceive no objection, legal or equitable, to this covenant, as well as the covenant of warranty, passing with the land, so long as the purchaser and the successive grantees under him remain in the undisturbed possession and enjoyment of the land;" and it was again reasserted many years afterwards, in the recent case of *Devore v. Sunderland*, 17 Id. 55.

We are disposed to take a similar view of our statute covenant. It proceeded, no doubt, from an instinctive feeling of the moral propriety of requiring a party who sells land, and not merely his own interest in it, whatever that may be, and conveys it by words of transfer appropriate to such a transaction, to secure to the purchaser, and those who succeed him in his rights, the enjoyment of the property sold, and to indemnify them if it should be lost by reason of any defect of title. This construction, we think, will best promote the object the legislature had in view, and subserve the purposes of justice in transactions of this kind; and we may remark here, historically, that the state of Maine, in the recent revision of her laws, has expressly provided that the right of action upon a covenant of seisin shall vest in the assignee of the land, so as to enable him to sue and recover in his own right after an eviction by a title paramount: R. S. 1841, tit. 10, c. 115, sec. 16; *Prescott v. Hobbie*, 30 Me. 346. When, therefore, a defeasible title, or the possession without any title, has passed under the deed, we shall consider the statute obligation in respect to the title rather as one of indemnity, which, running with the land until the damage is sustained, inures to the benefit of the party on whom the loss falls. The general doctrine of the old law as to the real warranty, that when no estate passes to which the warranty can be annexed the benefit of it does not run to a subsequent assignee, admitting it to be applicable to the modern covenants of title, is obviated in cases like the present by the American decisions that a conveyance by a grantor in possession under a claim of title passes an estate to the grantee sufficient to carry the covenants

to any subsequent assignee: *Slater v. Rawson*, 6 Met. 439, *Maraton v. Hobbs*, 2 Mass. 439 [3 Am. Dec. 61]; *Willard v. Twitchell*, 1 N. H. 178; *Beddoes v. Wadsworth*, 21 Wend. 120.

We proceed now to apply these principles to the case before us. The deed under which Desiré, the original grantor, derived his title was ineffectual to pass the fee, on account of the defect in the certificate of acknowledgment, as has been again decided at the present term; but as the actual possession went along with the deed, the covenant attached itself to the land and ran with it, until the paramount title was discovered and asserted. The covenant accordingly passed under the sheriff's conveyance to Dorsett, not as an independent subject of sale, but as an incident to the possession and apparent ownership of the land, upon the same principle that it would have passed had the sale and transfer been made by the owner himself. When paramount title was asserted, the party upon whom the loss fell became entitled to an action on the covenant for the damage he had sustained. The amount of this damage, however, is not admitted in the agreed case, nor do we think there are sufficient facts in it from which we can ascertain the amount as a matter of law.

On a covenant of warranty or seisin, where the transaction remains between the original parties, the measure of damage is the value of the land at the time of the sale, as fixed by the parties themselves in the price given and received. When, however, the original grantee has sold the land to another, and the second purchaser has been evicted, the damage he has sustained is the value of the land at the time of his purchase, and his right of recovery against the first grantor upon the original covenant must, of course, be limited to his actual loss, although it cannot exceed the liability of the first vendor to his immediate grantee. These are our present views upon this subject; but as the question as to the amount of the damages has not been argued, and as the judgment must be reversed, what is said upon that subject need not be considered as concluding us in any subsequent investigation of the case. It is admitted that upon this covenant it is not necessary for the party to show an eviction, but then he must show an outstanding paramount title which has resulted in some damage to himself; and if he insists that he has extinguished this title and seeks to recover the cost of it, he must show affirmatively that the price paid was reasonable; and whether this were so or not depends on the value of the lot at the time of the compromise, and not upon what it

was worth either when Mrs. Duncan purchased or when it was subsequently sold at sheriff's sale. Indeed, it may be, for aught we know, that the whole lot, at the time of the compromise, was worth very little more than twice the sum then paid for half of it. If, however, it were in fact worth the five hundred, and one half the purchase money paid by Dorsett, then the price paid was reasonable, and he and those claiming his rights are entitled, as we now think, to recover these two sums; but whether he will be entitled to interest upon the half of his purchase money depends upon circumstances not now disclosed: *Lawless v. Collier's Ex'rs*, 19 Mo. 485.

The judgment is accordingly reversed and the cause remanded, Judge Ryland concurring.

TERMS "GRANT, BARGAIN, AND SELL," IN DEED, import covenants of general warranty of title against incumbrances and for quiet enjoyment, as effectual as if such covenants had been expressed in the deed: *Bush v. Cooper*, 59 Am. Dec. 270, and cases in note thereto 274; *Fink v. Vonsida*, 14 Id. 617, note 628; but see, holding the contrary, *Richie v. Dickens*, 4 Id. 555; *Frost v. Raymond*, 2 Id. 228. Such covenants run with the land: *Suydam v. Jones*, 25 Id. 552; *Hunt v. Amidon*, 40 Id. 283, and notes collecting other cases; and descend with it to the heirs of the covenantee or vesting in his assignees: *Moore v. Merrill*, 43 Id. 593, and cases in note 597; *McCrady v. Brisbane*, 9 Id. 676; *Suydam v. Jones*, *supra*.

MEASURE OF DAMAGES FOR BREACH OF WARRANTY OF TITLE to land is the purchase money, with interest, from the time of the purchase: *Baxter's Adm'r v. McCoy*, 17 Am. Dec. 585; *Markland v. Crump*, 27 Id. 230; *Logan v. Moulder*, 33 Id. 338; *Elliott v. Thompson*, 40 Id. 630; *Clark v. Parr*, Id. 529; *Davis v. Smith*, 48 Id. 279, and notes to these cases collecting all cases in this series.

ACTION FOR BREACH OF COVENANT OF WARRANTY OF TITLE may be maintained without showing an actual eviction by a paramount title. A yielding up the possession to him who owns such paramount title, or purchasing that title, is sufficient: *Donnell v. Thompson*, 25 Am. Dec. 216; but see cases in note 221, and *Johnson v. Nyce's Ex'rs*, 49 Id. 444, and cases in note 447, holding that it is necessary, in such action, to show eviction.

STATUTORY WORDS "GRANT, BARGAIN, AND SELL," in a deed, imply an express covenant of indefeasible seisin in fee-simple in the land conveyed, which covenant is one of indemnity running with the land, continuing to successive grantees, and inuring to the one upon whom the loss falls: *Maguire v. Riggin*, 44 Mo. 514; *Jones v. Whitsett*, 79 Id. 191; *Walker v. Deaver*, Id. 675; *Hunt v. Marsh*, 80 Id. 398; *White v. Stevens*, 13 Mo. App. 346; *Walker's Adm'r v. Deaver*, 5 Id. 147; *Mecklem v. Blake*, 22 Wis. 498; *Eaton v. Lyman*, 30 Id. 51, all citing the principal case.

IN ACTION FOR BREACH OF COVENANT OF SEISIN, the measure of damages is the consideration given and received: *City of St. Louis v. Bissell*, 46 Mo. 160; *Kirkpatrick v. Downing*, 58 Id. 38; *Walker v. Deaver*, 79 Id. 769; *Ward v. Ashbrook*, 78 Id. 517; *Walker's Adm'r v. Deaver*, 5 Mo. App. 146; and in such action where the grantee takes possession under a grant, bargain, and

sale deed, he can recover only nominal damages until he has been compelled by the assertion of a paramount title to yield possession to the claimant: *Cockrell v. Proctor*, 65 Mo. 46; *Clark v. Bullock*, Id. 535; *Walker v. Deaver*, 79 Id. 675, all citing the principal case to the points above.

IT DEVOLVES UPON COVENANTER WHO BUYS IN ADVERSE TITLE, without suffering an action, to prove that the title purchased is good, and that it was purchased for a fair and reasonable price: *Hall v. Bray*, 51 Mo. 292, citing the principal case.

ACTIONS FOR BREACH OF COVENANT occurring in the life-time of the ancestor, but causing him no actual damage, should, after his death, be brought in the name of his heir or devisee: *Richard v. Bent*, 59 Ill. 42, citing the principal case.

SHERIFF'S DEED WILL PASS COVENANT OF TITLE: *Barnard v. Duncan*, 38 Mo. 182; and the grantee in a sheriff's deed is a purchaser, and takes such interest only as the judgment debtor had: *Fox v. Hall*, 74 Mo. 316, both citing the principal case.

BANK OF MISSOURI v. WHITE.

[23 MISSOURI, 342.]

IF ADMINISTRATOR'S SALE IS VOID FOR WANT OF CONFIRMATION, no title passes, and creditors and heirs of the estate are not entitled to equitable relief against purchasers at such sale; but must pursue their appropriate legal remedies: the creditors by proceeding in the probate court for a resale of the land, the heirs by suit at law to recover possession.

IF ADMINISTRATOR'S SALE IS NOT VOID BUT VOIDABLE MERELY ON ACCOUNT OF FRAUD practiced by the purchaser, equity will relieve by converting the purchasers into trustees against their will, and making the land subservient to rights of the defrauded parties by way of equitable trust, but a creditor cannot acquire priority for his debt in equity in a case of this kind.

APPEAL from the Lewis county circuit court. The opinion states the case.

Pratt, Glover and Richardson, and H. M. Jones, for the appellants.

Driden and Green, for the respondents.

By Court, LEONARD, J. This was a petition to set aside a sale and conveyance of real estate made by an administrator for the payment of debts under the decree of a probate court. A single creditor and the widow and heir of the intestate are the plaintiffs, and the purchasers of the land are the defendants. The petition charges that the sale was never approved by the probate court, as required by law; and that the purchasers acquired the land, at a great sacrifice to the owners, by fraudulent and other improper conduct at the bidding; and that the admin-

istrator (who is not a party to this proceeding) has made his final settlement, leaving the debt of one of the plaintiffs, who is the only remaining creditor of the estate, unpaid. Upon a trial by the court, it is found that the sale was never approved by the court; that the defendants effected the purchase by the alleged misconduct; and that one of the plaintiffs is a creditor of the estate, but whether the only creditor or not is not found. Upon these facts, the court declared that the sale was void for want of the judicial confirmation, and also on account of the alleged fraudulent conduct of the purchasers, and thereupon decreed a resale of the land, ordering the proceeds to be applied, first, to refund the purchase money, then to pay the creditor plaintiff his debt, and the residue to be distributed among the heirs of the estate.

It is insisted that the administrator's sale is a forced sale of the heirs' land, and that by an express sanction of it by the tribunal that ordered it, is prescribed by law as essential to its validity, and that the present sale is void for want of this confirmation. If this be true both in law and fact, no title passed; the condition of the party is not changed by the unfinished proceeding, and the creditors and heirs of the estate, instead of filing their petition for equitable relief against the purchasers, are at liberty to pursue their appropriate legal remedies for the enforcement of their respective rights: the creditors by a proper proceeding in the probate court for a resale of the land, and the heirs by their suit at law to recover the possession. With this remark we dismiss this part of the case, and refrain from expressing any opinion at this time upon this legal question, as it may be that the facts are not now sufficiently developed to enable us to determine it correctly in reference to the rights of the parties. It is enough for the present suit that if the sale and conveyance be void for want of confirmation, as plaintiffs insist, then they are not entitled to the equitable relief sought for by this petition, but must seek their remedy in a different manner.

If, however, the sale, instead of being void for the reason above suggested, were merely voidable in equity on account of the fraud practiced by the purchasers, equity will relieve by converting the purchasers into trustees against their will, and making the land subservient to the rights of the defrauded parties by way of equitable trust. A creditor, however, cannot acquire any priority for his debt by filing a bill of this kind; and therefore, where there are several creditors, it would be proper for the

court, instead of taking upon itself the administration of the fund, to order it to be paid into the hands of the administrator, to be applied according to law, under the supervision of the proper probate court. But the allegation here is, that there is but a single creditor, who, of course, is entitled to the fund before the heir; and if this be so, we see no reason why he should not be paid immediately out of the fund, instead of being remitted, together with the fund, to the county court for that purpose. That fact, however, is not found, and we shall therefore reverse the judgment and remand the cause. It has been strongly insisted before us that there was no evidence to establish the fraud; but as the course of the court has heretofore been, whenever the finding was defective, to set it aside altogether, and direct a new trial, and as that is the course we adopt in the present case, we refrain from expressing any opinion upon the evidence, and leave the tribunal, whether court or jury, before which the trial will be had, to determine the question of fact, uninfluenced by any expression of our opinion upon the subject.

The judgment is reversed and the cause remanded.

BONA FIDE PURCHASER FROM EXECUTOR HAVING NO POWER TO SELL ACQUIRES NO TITLE: *Williamson v. Williamson*, 41 Am. Dec. 636, note 643; *Worthy v. Johnson*, 52 Id. 399. Such purchaser may have the sale rescinded in a court of equity: *Woods v. North*, 44 Id. 312.

PERSONS PURCHASING AT VOID ADMINISTRATOR'S SALE will be declared trustees for the parties injured: *Williamson v. Williamson*, 41 Am. Dec. 636.

PACIFIC RAILROAD v. THE GOVERNOR.

[23 MISSOURI, 353.]

MANDAMUS MAY ISSUE TO GOVERNOR FROM STATE SUPREME COURT, when state constitution delegates the power to issue writs of *mandamus* to that court, and makes no exceptions as to persons.

GOVERNOR IS SUBJECT TO MANDAMUS to compel performance of ministerial acts, but the performance of discretionary acts cannot be compelled by courts.

COURTS MAY PASS UPON VALIDITY OF LAWS, judging them by the standard of the state constitution, when the legislature exceeds its powers in their enactment.

LEGISLATIVE JOURNALS ARE NOT RECORDS: they are of no validity after an act has passed the legislature.

STATUTE ROLL IS ONLY ABSOLUTE AND CONCLUSIVE PROOF OF STATUTE; this record imports absolute verity, and cannot be contradicted.

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CONSTITUTIONALITY OF STATUTE CANNOT BE ATTACKED BY INTRODUCING JOURNALS OF LEGISLATURE as evidence to contradict the statute roll.

LEGISLATURE MAY PROVIDE MODE BY STATUTE FOR AUTHENTICATION OF LAWS returned to the legislature by the governor without his signature, and after reconsideration passed by both houses, when the constitution is silent as to the mode by which such laws shall be authenticated.

APPLICATION for a *mandamus* to Sterling Price, governor of Missouri. The opinion states the case.

H. R. Gamble and T. T. Gantt, for the appellants.

Gardenhire, attorney general, for the governor.

By Court, SCOTT, J. On the tenth day of December, 1855, an act entitled "An act to secure the completion of certain railroads in this state" was passed by the general assembly, the governor's objections to the contrary notwithstanding. This act was authenticated pursuant to the constitution and laws, and was deposited by the governor in the office of the secretary of state. It is agreed between the parties to this proceeding that, according to the provisions of this act, if it is binding as a law, the Pacific Railroad Company became entitled, upon the performance of certain conditions therein mentioned, to have and demand from the governor of the state of Missouri, eight hundred state bonds, each for the sum of one thousand dollars, payable thirty years after date. It is also admitted that the said company has performed the conditions prescribed by the law, and did, on the seventeenth day of January, 1856, demand of the governor the said state bonds, and that the governor refused to issue them, alleging as a reason for such refusal that the proceedings of the general assembly, after the return of said bill by him with his objections thereto, were not in conformity to the constitution, and especially to the requirements of the tenth section of the fourth article of that instrument.

Extracting from the agreed case the substance of so much of the journals as shows wherein consisted the alleged irregularity in reconsidering the bill, after its return with the governor's objections, it appears that the bill was sent to the governor on the fourth day of December, 1855, for his approval; on the tenth day of that month it was returned to the senate, the house in which it originated, by the governor, with his objections, which were spread upon the journal of that day, and ordered to be printed. The bill was reconsidered on the same day and passed by the majority required by the constitution, its passage being evidenced by the names of those voting for and against it being

spread upon the journal. After having passed the senate, the bill, together with the governor's message, was on motion ordered to be sent to the house of representatives. On the same day that the bill passed the senate the fact of its passage by that body was communicated to the house of representatives, and it was immediately taken up for consideration, and after an unsuccessful motion to defer its reconsideration until the following day, and after dispensing with the reading of the governor's objections, it passed by the requisite majority, the ayes and nays for and against the bill being spread upon the journal. On the twelfth of December, on motion, the governor's objections to the bill were spread upon the journal of the house of representatives; and on the thirteenth day of December, the senate journal was, on motion, so amended as to make it appear that on the day on which the bill passed the senate it was ordered that the bill and message of the governor be sent to the house of representatives. It was further agreed that the admissions made on the part of the governor were made because the duties required by said bill are not political duties appertaining to his office of chief magistrate, but duties created by said bill, which he was willing to perform, if said bill be a law; in which event there shall be no necessity for the actual emanation of the writ of *mandamus*, the governor being only desirous to know whether the said law be constitutional or not. The foregoing are substantially the facts on which the *mandamus* is prayed, requiring the governor to issue the bonds demanded by the Pacific Railroad Company.

This application involves several novel and very important questions. But it has been intimated that the matter first to be determined is whether a *mandamus* can issue to the chief executive officer of the state requiring him to do any act; and that, in the event the opinion should be entertained, a *mandamus* cannot issue to the governor, then the judgment of this court, on the other questions involved in the case, would be extrajudicial, and should not be expressed.

We know no rule or principle of law which prescribes the order in which the matters of law involved in a controversy of which a court has jurisdiction shall be considered. If a question is fairly involved in a controversy, and it is so presented by the parties to it that its determination would settle the litigation, it would be unusual for the court to evade the question presented, and rid itself of the controversy by an opinion that would leave the legislation between the parties undetermined, to be again renewed.

This is a matter of prudence and discretion, in the exercise of which courts will be governed by circumstances. By the constitution of this state the supreme court has power to issue writs of *mandamus*, and to hear and determine the same. To the delegation of this power there is no exception. The jurisdiction conferred extends to all writs of *mandamus*, without any limitation whatever, and without any regard to the official rank or condition of the party. The jurisdiction granted, it is supposed, is to be exercised as jurisdiction is exercised in all other cases. When a court has a general jurisdiction over a subject, and a case arises for the exercise of that jurisdiction, the most appropriate course is to issue the writ to bring the party before it, and then to hear and determine the question whether the case made is a proper one for the remedy sought. That the exception is to the jurisdiction of the person makes no difference. That exception, when the court has jurisdiction of the subject-matter of the suit, is to be taken and determined like all others, after the return of the writ. It is erroneous to say that the court has no jurisdiction to issue a *mandamus* to the governor. The court has power to issue the writ, and after a return to it, will determine whether that officer is subject to it or not. If the conclusion is attained that the case is not a proper one for a *mandamus*, that is not a denial of the jurisdiction to hear and determine the cause, but a determination of the controversy in favor of the party claiming an exemption from the operation of the writ. Applications for a writ of *mandamus* may be based on such grounds as would, at the first blush, satisfy a court that it could not be sustained. Under such circumstances, it might, for the sake of expedition, be refused on the ground stated by the petitioner. This would be no denial of the jurisdiction of the court. As the court can issue the writ in cases of any doubt or importance, an order is made, as a matter of course, on the party to whom the writ is prayed, requiring him to show cause why he should not be required to do the act whose performance is sought to be coerced by the petitioner, and on his return made to this order all the questions involved on the case are determined.

In the case of *Low v. Governor Towns*, 8 Ga. 365, a *mandamus* was applied for to the governor. An order was made and served requiring him to show cause why a peremptory writ should not go; the governor appeared in obedience to the rule, and upon his showing cause, the court held that for political reasons the chief magistrate of the state could not, by ~~mere~~

damus, be compelled to perform even a mere ministerial act; yet an opinion was expressed in relation to the matter in controversy between the parties. In the case of *Taylor v. The Governor*, 1 Ark. 21, on an application for a writ of *mandamus* to the governor, the court, without determining the question whether a *mandamus* can be awarded to the chief magistrate of a state, gave an opinion on the merits of the controversy, and refused the writ. In the case of *Marbury v. Madison*, 1 Cranch, 50, the supreme court of the United States granted a rule on the secretary of state to show cause why a *mandamus* should not issue directing him to deliver a commission. The court heard the cause, expressed the opinion that the petitioner was entitled to his commission, and afterwards refused to issue a peremptory *mandamus*, on the ground that the law conferring jurisdiction on the supreme court to issue writs of *mandamus* to public officers was not warranted by the constitution. This was done by Chief Justice Marshall. If by the law of the land a writ of *mandamus* cannot issue to the chief magistrate of the state, we do not maintain that he can waive this exemption. The rule, *Qui libet potest renunciare juri pro se introducto*, is not applicable to the case. The question whether a governor of a state can, by a *mandamus*, be compelled to perform a mere ministerial act imposed on him by law has been discussed in the courts of some of the states of the Union, and has undergone some contrariety of determination. In the case of *Bonner v. State*, 7 Ga. 473, it was the opinion of the court that a writ of *mandamus* might be issued to the governor of a state requiring him to do a ministerial act. In the case of *Taylor v. The Governor*, 1 Ark. 21, the question was left undetermined. In the argument of the case of *Kendall v. United States*, 12 Pet. 524, the attorney general of the United States, though appearing on behalf of the officer to whom the writ of *mandamus* was prayed, conceded that such a writ might be issued against the president of the United States, to compel him to perform a duty merely ministerial—an admission entitled to some weight, when we take into consideration the officer by whom and the circumstances under which it was made. On the other hand, in the case of *Low v. Governor Towns*, 8 Ga. 361, we have seen that it was held that a writ of *mandamus* could not be issued to the chief magistrate of a state. The like doctrine was maintained in the case of *Hawkins v. The Governor*, 1 Ark. 570; and the court, in that case, refused to express any opinion on the matter in controversy, departing from the course that was pursued by the

same court in the case of *Taylor v. The Governor*, to which reference has already been made: 2 Story on Constitution, sec. 1569.

In the discussion of the question whether the chief magistrate of a state is subject to the writ of *mandamus*, the distinction between acts purely ministerial, about which he has no discretion, but is required by law to do them, and those in the performance of which his discretion or judgment is to be exercised, is constantly taken. The performance of one class of these duties, it is maintained, may be enforced by a *mandamus*, whilst the other, it is conceded on all hands, is of such a character that its performance cannot be compelled by the courts. In order, then, to a full investigation of the question whether the writ can issue to the governor, it is necessary to look into the law to ascertain the nature of the duties enjoined, preliminary to which the question would naturally arise whether the law was constitutional. It may be urged that the question may be considered whether the writ of *mandamus* will, in any case, be issued to the governor, and if it should be determined that it cannot be done, then there is an end of this controversy, so far as this court is concerned. In addition to the considerations heretofore addressed to this view of the subject, it may be remarked that this is a real controversy between the parties to this proceeding. A large portion of the people feel a deep interest in the execution of a law which they believe is not only essential to prevent a great sacrifice of capital already invested, but is ultimately connected with the improvement and permanent welfare of the state. A question arises whether that law is constitutional or not. An officer intrusted with the execution of that law entertains doubts whether it has passed in conformity to the requirements of the constitution, and seeks to have those doubts removed by the tribunal appointed, in the last resort, to ascertain and determine the meaning of the constitution and laws. In the proceeding instituted for that purpose, the constitutionality of the law is clearly involved, and it may be a question necessary to be determined in order to the settlement of this controversy. There are other questions involved, the determination of which, in a particular way, while it would end this suit, would not determine the matter in dispute. Under such circumstances, how much soever we may sympathize with those who were opposed to the passage of the law, we do feel that we would not have discharged the duty imposed on us were we to select one of the questions involved, which, if

determined in a particular way, would relieve us from the responsibility of settling the point in controversy. If, by such a course, this act should fail of being executed, no step has fallen under our observation so well calculated to inspire distrust in our institutions and laws. This court ordinarily, without hesitation, decides questions which are not necessary to be determined, in order to dispose of a suit, but which are required to be settled in order to adjust finally the matter in litigation between the parties.

The question involved in this case, about which our opinion alone is sought, is presented in such a way by the argument of parties as to render it unnecessary to decide whether a *mandamus* can issue to the chief executive, requiring him to do any act. Nor do we determine it, or preclude him from insisting on his exemption from it. We will express an opinion in relation to the point submitted for our judgment, and will so shape our course that the governor will, so far as our action is concerned, be entirely at liberty to raise the question of his liability to be coerced by a writ of *mandamus*, and have it judicially determined—a question about which we express no opinion, especially as it has not been argued on the part of the executive. After offering the foregoing considerations in vindication of the course which a sense of duty requires us to pursue on this occasion, we will proceed to consider the question which this application submits for our judgment.

Whilst the power of the courts to declare a law unconstitutional is admitted on all hands as being necessary to preserve the constitution from violation, yet such a power is claimed and exercised in relation to laws which on their face show that the constitutional limits have been transcended. The reason of this principle limits the claim of jurisdiction to such cases. The constitution is designed to limit the powers of the government and to confine each of the departments to its appropriate sphere. If the legislature exceed its powers in the enactment of a law, the courts, being sworn to support the constitution, must judge that law by the standard of the constitution, and declare its validity. But the question whether a law on its face violates the constitution is very different from that growing out of the non-compliance with the forms required to be observed in its enactment. In the one case, a power is exercised, not delegated, or which is prohibited, and the question of the validity of the law is determined from the language of it. In the other, the law is not in its terms contrary to the constitution; on its face it is regular,

but resort is had to something behind the law itself in order to ascertain whether the general assembly, in making the law, was governed by the rules prescribed for its action by the constitution. This would seem like an inquisition into the conduct of the members of the general assembly, and it must be seen at once that it is a very delicate power, the frequent exercise of which must lead to endless confusion in the administration of the law.

This inquiry may be extended to good as well as to bad laws—to those passed as well with the approval of the governor as to those which are passed his objections to the contrary notwithstanding; for it is clear that if a law passed over the objections of the governor may be impeached by inquiring whether the forms of the constitution were observed in its enactment, the same inquiry may be instituted in relation to laws passed with his sanction; and thus statutes constitutional on their face, regular in their terms, which may have been the rules of action for years, and under which large amounts of property have been vested and numerous titles taken, may be abrogated and declared void. A principle with such a consequence should be supported by a weight of authority which no court can resist. When we reflect on the manner in which the journals are made up, and the rank of the officers to which that duty is intrusted, how startling must the proposition be that all our statute laws depend for their validity on the journals of the two houses of the general assembly showing that all the forms required by the constitution to be observed in their enactment have been complied with. The required forms may be observed and the clerks may fail to make the necessary or correct entry. If the journals have been designed as the evidence in the last resort that the laws were constitutionally passed, would not some method have been adopted by which greater care would have been exacted in entering the proceedings of the two houses? Would the task of making them have been intrusted to a single clerk, with a power in the houses to dispense with their reading, even should there be a rule requiring them to be read—a matter, however, about which the constitution and laws are silent? In that country from which we borrow so many of our ideas respecting government and laws, and whose common law and early statutes constitute the substratum of all our systems of jurisprudence, the statute roll is the only and the exclusive evidence of what the statute law is, so long as it is in existence. Then it is maintained that if the journal were every way full

and perfect, yet it hath no power to satisfy, destroy, or weaken the act, which, being a high record, must be tried only by itself, *teste meipso*. "Journals are no records, but remembrances for forms of proceedings to the record; they are not of necessity, nor have they always been. They are like the dockets of the prothonotaries, or the particulars to the king's patent. The journal is of good use for the observation of the generality and materiality of proceedings and deliberations, as to the three readings of any bill, the intercourses between the two houses, and the like; but when the act is passed, the journal is expired:" *Rex v. Countess of Arundel*, Hob. 110. "The judges ought to take notice of a general law, for they are to determine whether it be a statute or not, and therefore a man cannot plead *nul tiel record* to it. It shall not be proved by a journal:" Hale's Hist. Com. Law, 13. Numerous authorities might be cited of the same purport.

So it appears that by the common law the statute roll was the absolute and conclusive proof of a statute. This record could not be contradicted. It implied absolute verity. There was no plea by which the existence of a statute could be put in issue. Under this state of the law our constitution was adopted. That instrument provides that every bill, having passed both houses, shall be signed by the speaker of the house of representatives and by the president of the senate. This is the mode adopted for the authentication of every bill, and furnishes the evidence of its passage by the two houses in the first instance. The governor's signature to a bill is not required as a means or part of its authentication, but as evidence of his approval. The governor, being no member of either house, and in contemplation of the constitution not being present during their deliberations, could not know whether a bill had passed the two houses or not. The constitution itself contemplated that there might be laws without the signature of the governor, and therefore the mode of authentication adopted was the evidence of the passage of all bills, in the first instance, by the two houses, as well those passed with his approbation as those passed against his consent. Now, looking at the matter by the light of reason alone, is not the evidence furnished by the roll, that the bill has passed the two houses, stronger and more conclusive to the mind than that furnished by the journal? The constitution does not expressly require a journal to be kept, though it evidently contemplates that there would be one. But it nowhere provides how the journal shall be authenticated. It does not require that it shall

be signed by any one, not even a clerk. It is not required to be read or examined. Now, is not the evidence furnished by the bill, authenticated in the manner prescribed by the constitution, with the signatures of the highest officers of the two houses, more conclusive to the mind than the unauthenticated journals kept by the two houses? But on what principle is a resort had to the journals to impeach the validity of a law? It could not be done at common law; there is nothing in the constitution which authorizes any such resort even by implication. There is no statute law which sanctions such a course. Where, then, is the authority found for going behind the statute roll, and looking into the journals of the two houses, in order to ascertain whether they have conformed their conduct to the constitution in the enactment of the laws? Greenleaf is cited (sec. 491) to show that the journals of either house are the proper evidence of the action of that house upon all matters before it. This is unquestioned law. But it is clear that the author did not mean that the journals, which are not records, are evidence to contradict the most solemn records known to the constitution and laws. In support of the position, reference is made to English authorities. Now, those authorities, while they admit the journals are evidence, could never intend that they were evidence to contradict the statute roll; for if any one thing is better settled in the English law than all others, it is that the statute roll is a record of so high a nature that it imports absolute verity, and cannot be contradicted.

The case of *Root v. King*, 7 Cow. 613, is also cited by Greenleaf to show that the journals of the houses of assembly are evidence; but a reference to that case shows that the point whether they are evidence to contradict the statute roll was never thought of or considered. Documents may be evidence for one purpose but not for another. The oath of a competent witness is evidence; but because it is evidence, is it therefore to be received to contradict a solemn record? But it is said that courts have the undoubted right to declare the laws unconstitutional. No principle is better settled than this. But it has no application to the question under consideration; it has been applied to those cases in which it appears from the face of the law itself—cases in which it was conceded that the forms of the constitution were observed in its enactment. It has not been perverted to the purpose of going behind the statute roll in order to ascertain whether the legislature did not depart from the rules prescribed by the constitution for the government of its conduct in making the

laws. In our investigation we have not met with a single case in which the courts have looked behind the statute roll in order to determine whether, in passing a law, the members of the legislature conformed their conduct to the rules directed by the constitution to be observed in framing laws. The case of *Spangler v. Jacoby*, 14 Ill. 299 [58 Am. Dec. 571], does not detract from the correctness of this assertion. Nor do the cases of *Douglass v. Bank of Missouri*, 1 Mo. 23, and the *State v. McBride*, 4 Id. 303 [29 Am. Dec. 636]. The question how far it is permitted to go behind a statute roll in order to ascertain whether a law has been passed in conformity to the requirements of the constitution has been considered in the courts of the state of New York. But the history of the controversy will show that the power assumed in this case was never claimed by one for the courts. By the constitution of the state of New York it is prescribed "that the assent of two thirds of the members elected to each branch of the legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes, or creating, continuing, altering, or renewing any body politic or corporate." It was provided by a law that no bill shall be deemed to have been passed by the assent of two thirds of the members elected to each house unless so certified by the presiding officer of each house. A statute made it the duty of the secretary of state to certify and indorse upon every bill the day, month, and year when the same became a law, and make such certificate conclusive evidence of the facts therein declared. Under this provision of the constitution and these statutes, the general banking law, and others altering the charters of bodies politic, were passed; they passed, however, as ordinary laws, and were not indorsed by the presiding officers of the two houses as having passed by a two-thirds vote. Questions arose whether these laws were not within the meaning of the constitution, and therefore should have been passed by a vote of two thirds of the members of each house. It was held that these laws were not within the provision of the constitution requiring a two-thirds vote for their passage, and so a decision of the question as to their constitutionality became unnecessary. The extreme claim of those who maintained that the constitutionality of these laws might be inquired into by going behind the certificate of the secretary of state was limited to the examination whether the requisite number of votes had been given to pass them. The constitution requiring that the vote of two thirds of the members should be necessary to pass such laws, it was maintained that

the number of votes by which they had passed was of their essence and vitality, and therefore could be inquired into. Those who maintained this opinion deprecated any further inquiry into the manner in which the general assembly had conducted itself in the enactment of laws, maintaining that the certificate of the secretary of state was conclusive as to all other matters. This is as far as any case which has been shown us has gone.

It is the principle of the case of *Spangler v. Jacoby*, 14 Ill. 299 [58 Am. Dec. 571], to which reference has been made. It is the principle of the case of *State v. McBride*, 4 Mo. 303 [29 Am. Dec. 636]. The case in Illinois seems to be founded on the peculiarity of the constitution of that state. The case of *McBride* was not a case in which the authenticity of a statute roll was involved, but grew out of the provision in our constitution respecting the mode of making amendments to it, and is deemed inapplicable to the question under consideration, as neither the constitution itself nor any statute prescribed a mode by which they should be authenticated, or declared what should be the evidence of their passage. If the principle contended for in this case, and which, to the extent claimed for it, we have found maintained in no other, is sanctioned, then every law may be overturned which is shown by the journals to have been irregularly passed. It is asked, Is the constitution to be departed from with impunity? and is there no way to confine the legislature to the observance of the rules of conduct prescribed by the constitution for its government in the enactment of laws? Our government is administered by means of trusts reposed in agents. Powers are confided to all the departments to be exercised in a mode prescribed by the organic law. The course required to be observed in the performance of an act is not always of its essence or vitality. When an act is directed to be done in a particular way, the direction may be merely mandatory—that is, it is not of the essence of the act, but the act may stand in law notwithstanding the direction was not strictly observed. This is a familiar principle. Those exercising the powers of the several departments are sworn to support the constitution; yet if they violate their duty, the exigencies of government require that their acts must be upheld. This is not true of all violations of the constitution, but is particularly applicable to violations of the class of those which are urged against the validity of the law under consideration. We do not mean to say that the general assembly violated its duty in the mode adopted in the reconsideration of the bill which is now before

us. All we design to hold is, that there are forms to be observed in the enactment of laws; that the members of the legislature are sworn to observe those forms; and yet, if they are violated, the constitution never intended that their acts should be void. The provisions of the constitution alleged to have been violated in the reconsideration of this bill were designed to be directory. The objections urged against the manner of its reconsideration are of such a character that it is impossible to say that if they did not exist the result would have been the same. If the form of spreading the message upon the journal and reading it in both houses had been complied with before the bill had been reconsidered, and all the members of both houses had stopped their ears and absolutely refused to hear or be informed of the nature of the governor's objections, would not the law still have been binding? Would not the spirit of the constitution have been violated by such a course, and yet the law be adjudged constitutional? The same arguments which show that there must be an inquiry into the regularity of legislative proceedings are as strong to show that there should be an inquiry into the acts of the other departments. Would it be allowed to inquire whether a judgment pronounced by this court, regular on its face, was not concurred in by the requisite number of judges? If the minutes of the court showed that a judgment was different from that entered of record, could the minutes be produced in evidence to invalidate the judgment? The constitution, in requiring the governor to approve a bill, contemplated that the act of approval should be done understandingly; that he should be informed of its contents. Now, in order to defeat a law, could it be shown that the governor approved it without knowing anything whatever in relation to it? The sense of the words in which the forms to be observed in legislation are prescribed may be matter of doubt. Different opinions may be entertained as to the meaning of the language in which they are expressed, as well as to the end or object of them. This very case furnishes an illustration of the truth of this remark. The members of the general assembly may conscientiously believe that they have pursued the constitutional course. But to give the executive and judicial departments a right to re-revise this exercise of their judgment, would it not be subjecting the legislature to a surveillance, which, instead of making it a co-ordinate department, would subject it to a dependence on the others. There is a fitness in making each department the sole judge of the rules prescribed for its conduct; this is necessary to render them co-ordinate, and not dependent on each other.

It remains to consider an argument drawn from the omission in the constitution to provide a mode of authentication for those laws returned by the governor without his signature, and, after reconsideration, passed by both houses. From this omission, the argument was advanced that the constitution failing to provide a mode of authentication for such laws, the journals of the two houses were the only evidence of the passage of them, and from those journals it must appear that the action of the two houses was in conformity to the forms prescribed by the constitution. The constitution having omitted to provide how those laws should be authenticated, it was competent for the legislature to do so. Hence we find that as early as the year 1820 a statute now in force in relation to this subject was passed.

We do not maintain that the legislature can prevent a scrutiny into its acts, which the constitution designed should be made, by any mode of authentication it may adopt. We have endeavored to show that the constitution never contemplated that objections of the character urged against the law whose validity is now under consideration should be raised against a bill passed with the approval of the governor. There is no reason why objections of a like character should be raised against a bill passed against his will. As the constitution did not contemplate that such objections should be fatal to the validity of a law, the mode of authenticating bills passed over the objections of the governor, provided by the act of 1820, and which continues in force to this day, is consistent with the constitution, and is binding and conclusive. As the signatures of the presiding officers of the two houses were the evidence of the passage of a bill in the first instance, nothing was more appropriate than that the certificates of the same officers should be evidence of its passage against the consent of the governor. As their certificate shut out objections against the manner of passing bills in the first instance, it is entirely consistent with the constitution and with reason that a like certificate should silence all objections of a like character taken against the mode of passing it on its reconsideration.

Upon the whole, we are of the opinion that the objections taken against the mode of passing this law by the general assembly on its reconsideration are untenable; that the constitution and law precludes an inquiry as to the existence of such objections, the constitution regarding the provisions alleged to have been violated in the passage of this law as merely direc-

tory, and being so a departure from them, even if there was a departure, would not render the law void. Under the circumstances, we will not direct a peremptory writ, but a rule *nisi* will be made.

LEONARD, J., dissents. —

POWER OF JUDICIARY TO ISSUE MANDAMUS AGAINST GOVERNOR.—*Mandamus* to compel the governor to perform a ministerial act: *Hawkins v. Governor*, 33 Am. Dec. 346, and extended note thereto 361, where this question is fully discussed.

JOURNALS OF EITHER BRANCH OF LEGISLATURE may be appealed to to show that a particular act was not passed in the mode prescribed by the constitution, and thus defeat its operation altogether: *Spangler v. Jacoby*, 58 Am. Dec. 571, note 574, collecting prior cases, and citing the principal case; note to *Jones v. Jones*, 51 Id. 616, also citing the principal case, and discussing the question at length.

ENROLLMENT OF STATUTE is an unimpeachable record: Note to *Jones v. Jones*, 56 Am. Dec. 616; but see *Spangler v. Jacoby*, 58 Id. 571, where it was held that the signatures of speakers and executive to the act are presumptive, but not conclusive, evidence of the passage of the law, and this presumption may be overcome by the journals.

GOVERNOR MAY BE COMPELLED BY MANDAMUS to perform ministerial acts: *State ex rel. Bartley v. Governor*, 39 Mo. 388; *Sutherland v. Governor*, 29 Mich. 327, both citing the principal case.

VALIDITY OF STATUTE authenticated in the manner prescribed by law cannot be impeached by showing a departure from the forms prescribed by the constitution for the passage of the act: *City of St. Louis v. Foster*, 52 Mo. 515. Such act is not void: *City of Cape Girardeau v. Riley*, Id. 427; and legislative journals are inadmissible as evidence to impeach the acts of a legislature: *Ball v. Fagg*, 67 Id. 484; *Sherman v. Story*, 30 Cal. 272; but the constitution of Missouri has since provided otherwise: *State ex rel. Attorney General v. Mead*, 71 Mo. 270; *In re Roberts*, 5 Col. 529, all citing the principal case.

THE PRINCIPAL CASE IS CITED in *Town of Pacific v. Siefert*, 79 Mo. 213, to the point that the statute roll is the best evidence of a legislative enactment; and in *Evans v. Brown*, 30 Ind. 525, that the statute roll cannot be impeached by other evidence.

SALISBURY v. MARINE INSURANCE COMPANY OF ST. LOUIS.

[23 MISSOURI, 553.]

INSURERS GUARANTEE ONLY SAFE ARRIVAL OF GOODS. They do not guarantee speedy arrival, nor arrival in time for an advantageous market, nor do they incur loss from delay in the voyage, unless the delay is produced by peril insured against, or the cargo be subject to deterioration by mere lapse of time.

MASTER MAY TRANSSHIP INSURED CARGO if original ship is disabled; and if he, acting with discretion, forwards the cargo in another ship, such change

will not discharge the insurer of the goods from liability for loss which may take place subsequent to transshipment; but if the transshipment is not necessary, or without the insurers' consent, he will be discharged.

DELAY OF TWELVE DAYS IN TRANSPORTATION OF INSURED CARGO, occasioned by waiting for necessary repairs, will not justify transshipment of cargo in another vessel. By such transshipment the insurers are discharged from liability for loss subsequently happening to the cargo in the new bottom.

APPEAL from the St. Louis court of common pleas. The opinion states the facts.

Kasson, and Hudson and Thomas, for the appellant.

Krum and Harding, for the respondents.

By Court, RYLAND, J. This was a suit upon a policy of insurance. The facts were found by the court, and judgment rendered thereon for the plaintiff. The only question here is, whether, upon the facts found, the carrier was authorized to transship the property insured so as to subject the underwriters to a loss that subsequently occurred to the goods in the new bottom, occasioned by a peril insured against. The facts found are as follows: "On the thirty-first day of March, 1853, the plaintiffs were possessed of twelve wagons, and a lot of other merchandise, all valued in the policy hereinafter named at one thousand nine hundred and seventy dollars; and the plaintiffs caused them at that date to be insured at that valuation in the open policy of John McMechan, issued by defendant; and so the defendant accepted the risk in consideration of a premium of forty-nine dollars and twenty-five cents paid to the company therefor, John McMechan being insured thereon for the benefit of plaintiffs. The insurance was upon merchandise on the steamboat Georgia, from St. Louis to Council Bluffs. And said insurance was taken by indorsement in policy-book, as customary, and as above stated, and for plaintiffs' benefit. Said steamboat Georgia departed on said voyage with the merchandise aforesaid on board, and proceeded in safety to a point on the Missouri river some distance above St. Joseph, where, in endeavoring to round a point, she was caught by an eddy, which she was trying to avoid, and forced towards the river-bank, where her cabin was broken, and her chimneys were caught in a tree and broken off, so that one was lost in the river and the other hung by attachment to the boat. This chimney was saved and afterwards cut in two, and so put up to supply temporary chimneys by the hands of the boat, after her return to St. Joseph, but only serving as half-chimneys. The water was rising, and she could not make steam enough to go up with her

cargo. She returned to St. Joseph. This was a safe port to lie in, and there was ample room and warehouses for storage of her cargo; or the boat could have remained there in security with all her cargo unmoved in safety on board until she could have sent an order to St. Louis for new flues and received them at St. Joseph, where she could have readily put them up and proceeded on her voyage. St. Louis was the nearest port where the necessary chimneys and repairs could have been procured. It would have taken twelve days to have made the trip to St. Louis, put on the necessary repairs, and returned to St. Joseph, or to have sent to St. Louis for chimneys and put them up. The only obstruction to her proceeding on the voyage with her cargo was her want of sufficient draught from loss of chimneys to keep up a sufficiently hot fire to make steam enough for up navigation.

“It also appears that some boats can sometimes construct temporary flues out of common boards and sacking for the purpose of increasing the draught, and have so sometimes proceeded up stream for hundreds of miles with cargo on board, but that the Georgia was not so constructed as to be able to do so. As it was in this case, the Georgia, at Council Bluffs, made a contract with the Kansas steamboat by which the Kansas paid her a large proportion of her freight to accrue, and the whole cargo, including the merchandise in question, was transshipped to the Kansas, with which the Kansas left that port and proceeded towards Council Bluffs, and on her way, about the twentieth of April, 1854, was, by a peril of the river, sunk. Part of said merchandise insured was lost, and part, being nine wagons, saved in a damaged condition. This property saved was worth three hundred and sixty dollars. The whole amount insured was one thousand nine hundred and seventy dollars. The salvage was therefore eighteen and one third per cent of the valuation in the policy. Applying this percentage to the actual invoice value (which was one thousand nine hundred and ten dollars and fifty cents), as required by the terms of the policy in case of partial loss, the actual damage to the plaintiffs was one thousand five hundred and forty-one dollars and thirteen cents on July 1, 1853. Due preliminary proof was offered, but waived by the company's refusal to pay upon other facts in the case. If the company became liable to pay, that liability was mature on the first of July, 1854. Both steamboats were seaworthy at the time of their respective shipments of said cargo. The court find, also: 1. That said loss of chimneys was the only hinderance to

the Georgia's proceeding on her voyage; and that without other repairs than above mentioned, as made by cutting one chimney into two, she returned in safety to St. Louis, her port of departure, and thence proceeded down the Mississippi without further repairs, but that without further repairs she could not make sufficient steam to proceed from St. Joseph to Council Bluffs with her cargo; 2. That all needful repairs could have been made at moderate costs, in forty-eight hours, at St. Louis, whereupon she could have resumed and completed her voyage to Council Bluffs; that but one new chimney was required from St. Louis; the other chimney, which had been cut in two, could have been riveted together and put up at St. Joseph, and also at St. Louis; that the Georgia would have required but twelve days to have returned to St. Louis and repaired, and returned again to St. Joseph, and started on her voyage up with said cargo, which could in the mean time have been stored safely at St. Joseph; 3. That the Georgia could have remained safely at St. Joseph without any change of cargo; ordered and obtained, at reasonable cost, a new chimney from St. Louis; put up both chimneys at St. Joseph, and after twelve days' delay thence from her arrival, which would have been all the detention necessary, could have proceeded on and accomplished the voyage insured in two or three days from that time; 4. That this merchandise was intended to proceed on the route to California with its owners, the plaintiffs, in that season which commenced (for the departure of trains from various points from Council Bluffs down below St. Joseph, so far as Weston and Independence) from the first of April to the middle of May; and the Georgia left St. Joseph on her return to St. Louis on the eighteenth of April, 1854. The interest on damages from July 1, 1853, to the present time is one hundred and seventy-one dollars and forty-nine cents."

From these facts, the main question arises, Will a detention for twelve days, on a voyage up the Missouri, from St. Louis to Council Bluffs, warrant the boat originally undertaking to transport the goods in transshipping them on another boat so as to continue the policy on the goods in the new bottom? The Georgia was disabled, by the loss of one chimney and by her cutting the other into two parts in order to come down to St. Joseph, from immediately prosecuting her voyage up the Missouri. She returned to St. Joseph, and there had a safe port. The goods were on board uninjured; there were good and sufficient warehouses to store away the goods, and it would have

taken about twelve days for the Georgia to have come down to St. Louis, and refitted and repaired, and returned to St. Joseph ready to proceed on her voyage. Or she might have remained in the port of St. Joseph in safety, with her cargo uninjured, until she could have sent to St. Louis and have procured the necessary repairs, and have been ready for the trip again in twelve days. So the detention of twelve days is all that she had to justify her in making the transshipment.

This detention does not, in our opinion, break up this voyage, so as to make it the master's duty to transship, or give him the privilege to transship. Here, by the boat's running into an eddy, she had her chimneys carried away; one was entirely lost overboard, the other was lodged and retained, was cut into two parts, and put up so as to enable the boat to descend the river to the port of St. Joseph; but these, thus cut and shortened, were not of sufficient length to make draught sufficient to create steam enough to propel the boat up stream. There was no place to procure a chimney nearer than St. Louis. The boat came to a safe and sufficient harbor, and could have come on down to St. Louis, and procured a new chimney, have the other again put together by rivets and bands, making a sufficiently good chimney, and have returned to St. Joseph in twelve days, or might have all necessary repairs ordered from St. Louis and in twelve days been ready to commence again ascending the river from the port of St. Joseph. Was it the duty of the master to make this transshipment. The goods were wagons—property not easily deteriorated by delay in delivery. Now, suppose the Georgia had been run on a sand-bar in the night, with a falling river, and had been detained in making efforts to extricate herself from the bar for twelve days in vain: would this have been a sufficient cause to justify transshipment in a lighter vessel, so as to continue the policy in the goods in the new bottom? Surely not. The insurers did not estimate the rapidity with which the voyage was to be, or could be, made. The safety of the goods on the voyage, long or short, was their object.

We are of opinion that the facts found here by the court did not amount to a breaking up of the voyage, or to such a disaster to the boat as would justify her in sending on the goods by a new bottom; that this transshipment was at the master's risk, and not at the insurers'; it was for his interest and not for the benefit of all. The insurers guarantee only the safe arrival of the goods. They do not guarantee the speedy arrival; nor do they incur any loss on account of the new delay in the voyage, unless the delay

be produced by a peril insured against, and the cargo, in consequence of the damage occasioned by such peril, or of its perishable quality, be subject to deterioration by mere lapse of time; nor do the insurers guarantee by their general undertaking that the cargo shall arrive in time for an advantageous market; they have nothing to do with the fluctuations of the market. If the vessel be only partially injured, and might be repaired in a reasonable time and at reasonable cost, it is the duty of the master to do it, and to forward the goods in his own vessel: *Schulls v. Ohio Ins. Co.*, 1 B. Mon. 336. The detention of twelve days in this case is not an unreasonable delay. The master should have waited and made the repairs, and then proceeded on his voyage. His transshipment in this case cannot be said to be for the general interest of all parties. No doubt that a master may transship when his vessel has been so injured that repairs would be unreasonable, or the time required to make them so long as to ruin the goods by delay. "By the contract, the ship-owner, and the master as his agent, is bound to carry the goods to their destination in his own ship, if not prevented from doing so by some event which he has not occasioned, and over which he has no control:" *Shipton v. Thornton*, 9 Ad. & El. 314. "If, by reason of the damage done to the ship, or through want of necessary materials she cannot be repaired at all, or not without very general loss of time, the master is at liberty to procure another ship to transport the cargo to the place of destination. But if his own ship can be repaired, he is not bound to send the cargo by another, but may detain it till the repairs are made:" Abbott on Shipping, 448, 449. The general doctrine, however, clearly is, that if, by reason of stranding or some other unexpected cause, it becomes impossible to convey the cargo safely to its destination in his own vessel, the master is to do what a prudent man would think most for the benefit of all concerned. Transshipment to the place of destination, if it be practicable, is the first object, because that is the furtherance of the original object: Angell on Carriers, sec. 187. It is recognized as an undoubted doctrine of insurance law that if the original ship be disabled, and the master, acting with a wise discretion, as the agent of the merchant and the ship-owners, forwards the cargo in another ship, such necessity and justifiable change of ship will not discharge the underwriter on the goods from liability for any loss which may take place on goods subsequently to such transshipment; but if this transshipment be without necessity, or without the

underwriter's consent, he will be discharged. If, in the course of the voyage, the ship becomes so disabled as to be incapable, by any means at the master's disposal, of being repaired at all so as to take on the cargo, the master, as agent for all concerned, may procure another ship in which to forward the cargo to its port of destination; and in such case the change of ship does not discharge the underwriter on goods, freight, or profits from his liability for any loss on the subjects they have insured which may occur subsequently to such change of ship: Arnould on Ins. 178, 179.

In the case of *Field v. Citizens' Ins. Co.*, 11 Mo. 50, the original boat was so injured that she could not pursue her voyage; she stored her cargo safely and returned to St. Louis, where she was repaired. She shipped her cargo, as she thought it her duty to do, but the master of the original boat insured made an agreement with the insurance company that they would be bound by their policies on the cargo in the new bottom. He did not run the risk of transshipping, in the idea that the policy on his boat attached to the transshipped cargo. He therefore made an agreement with the underwriters in relation to it. It does not bear with any authority on this question.

We have carefully looked into the various decisions on this question, and become satisfied that the mere delay occasioned by waiting for the necessary repairs in this case did not justify and warrant the transshipment into the new bottom, and that the underwriters are discharged from any loss subsequently happening to the cargo in the new bottom.

It was the duty of the master of the Georgia to have repaired it by taking proper steps, and the time necessary to repair is not unreasonable. He acted only for his own interest, disregarding the underwriters. Permit such an accident or such a disaster, under such circumstances, so easily repaired, and causing only a few days' detention in a safe port, the cargo uninjured, to justify the master in breaking up his voyage and changing the boat, and thereby causing the policy to attach on the cargo in the new bottom, and the rights and safety of underwriters must gradually give way and fall, without a principle to support and protect them.

Under this view, the judgment of the court below must be reversed, and, with the concurrence of the other judges, it is reversed accordingly.

DELAY OF INSURED CARGO for three weeks is not sufficient cause to justify the master of a vessel in transshipping cargo, and where such transshipment is made without the consent of the insurers, they will be discharged from lia-

bility: *Malinckrodt v. Jefferson Fire Ins. Co.*, 1 Mo. App. 203, citing the principal case. Unnecessary transshipment of goods insured in one vessel to another discharges the insurers: 1 Phillips on Ins. 556, citing, with others, the principal case.

VASQUEZ v. EWING.

[24 MISSOURI, 31.]

ACT OF CONGRESS CONFIRMING APPROVED SURVEY of commons in villages was equivalent to a patent, and conveyed to the city of St. Louis a perfect title to her commons from the government. A claimant seeking to dispossess her, or those claiming under her, of such title, must produce actual proof of prior cultivation, inhabitation, and possession. *Prima facie* proof of such fact is not sufficient.

CO-TENANT IN POSSESSION IS NOT ESTOPPED FROM DENYING TITLE OF HIS CO-TENANTS, where he came into possession through a deed from another co-tenant against whom he had obtained judgment of possession at the time that the deed was made, at which time a writ for delivery of possession was in the hands of an officer. This latter proceeding terminated the co-tenancy; actual execution of the writ was not necessary to effect that object.

PARTIES CANNOT CLAIM EQUITABLE RELIEF IN ACTION OF EJECTMENT, UNDER PETITION, the allegations of which are only suited to try the legal title. If the parties are entitled to equitable relief, they must seek it in a separate proceeding.

EJECTMENT to recover possession of certain lands in the county of St. Louis. Plaintiffs claim title as heirs of one Benito Vasquez, and allege that said lands were confirmed to them by act of congress, June 13, 1812. At the trial, they introduced in evidence a certified copy of an extract from a list furnished by the recorder of land titles in the state of Missouri to the surveyor general of Illinois and Missouri, pursuant to act of congress of May 26, 1824. The extract is as follows:

	1825.			Feet.	Arpens.
No. 658.	August 13.	Near town of St. Louis.	Bounded in part eastwardly by the commons or vacant land; thence running back eight arpens, so as to include the spring usually called Benito's spring.		4 front. 8 deep.

Plaintiffs also introduced in evidence a certificate of the surveyor general of Illinois and Missouri, to the effect that the above is a true copy of the extract, and that it stood in the name

of Benito Vasquez' legal representatives. Plaintiffs also introduced as evidence a certified copy of United States survey, No. 2965, which survey was for the legal representatives of said Vasquez, of a tract of land four by eight arpens, and embracing the land at present in controversy. They introduced evidence to prove that they were the heirs and legal representatives of said Vasquez; that one Quinette had been in possession of the land, holding a portion of the Vasquez title; that defendant, claiming by title adverse to that of Vasquez' heirs, having obtained judgment against Quinette for possession of said land, and that a writ of possession having been placed in the sheriff's hands, Quinette executed a deed of said tract to Ewing, which deed recited that the land conveyed thereby is "the same which the said party of the first part acquired of the heirs and legal representatives of Benito Vasquez by deed bearing date September 3, 1847," etc. Defendant Ewing proved that the tract of land in controversy was embraced within the common of St. Louis, as per the United States survey. Upon motion of defendant the court instructed the jury that plaintiffs were not entitled to recover. Plaintiffs excepted, and bring the case to this court by writ of error.

F. A. Dick, for the plaintiffs in error.

H. S. Geyer, for the defendant in error.

By Court, *Scorr, J.* 1. The case of *Le Bois v. Bramell*, 4 How. 449, establishes the doctrine that the approved survey of the commons of a village confirmed by the act of June 13, 1812, is equivalent to a patent. If this is so, then the city of St. Louis had as perfect a title from the general government to her commons as could be obtained. That title being perfect, it could only be surmounted by the proof of facts which showed that she could not have had title. Her title could not be assailed by the government, nor any one claiming subsequently to her confirmation. By the act of 1812, if one could actually show that he inhabited, cultivated, or possessed a lot within its meaning prior to the twentieth of December, 1803, within the boundary of the survey of the commons, he would have a better title than the city; for, being a lot inhabited, cultivated, or possessed, it could not have been commons. But the city having a perfect title against the government, and against all the world except such a claimant, in order to dispossess her, or those claiming under her, the fact of cultivation, inhabitation, or possession prior to the twentieth of December, 1803, must be actually proved.

Prima facie evidence of such fact is not sufficient. The city having a perfect title against all who do not show actual inhabitation, cultivation, or possession, on what principle in law or reason can one who has only *prima facie* evidence of one of these facts overthrow her title? Her perfect title is of no avail if, when it is attacked, she has to disprove her assailant's title. As against the perfect title, nothing but an actual showing of the existence of the fact which will overcome it can be deemed sufficient. The villages whose commons were confirmed by the act of 1812 were not authorized to prove their claims before the recorder under the act of 1824. How unjust, then, to make the proof taken by an individual claimant of such effect as to throw the burden of disproving it on the villages. If the villages could have proved their claims, then they would have *prima facie* evidence against *prima facie*, and being in possession, they could not be disturbed. By the act of 1812, the title of the villages to commons could only be overcome by actual proof of the inhabitation, cultivation, or possession of part of them prior to the twentieth of December, 1803, by inhabitants of the villages, as a lot, out-lot, or common field-lot. If it was competent to congress to do so, we will not presume that they intended by the act of 1824 to require evidence less strong than the act of 1812 to overthrow the claims of the villages enumerated in the act to their commons.

We are not aware of any case in which the precise point involved in this controversy has arisen. The doctrine that the certificates and proofs taken before the recorder, under the act of 1824, were *prima facie* evidence, was not established without a struggle. Taken, as it has been received, that the certificates were *prima facie* evidence against the government, there is not much to be said against it. Being evidence against the government, those claiming subsequently to the act of 1812 cannot occupy a more advantageous position than the government itself maintained. But we can see no reason nor perceive any principle on which a certificate of the recorder should have a prevailing effect, unless disproved, against one claiming under the act of 1812, or any act prior thereto. Indeed, it would be against principle, as it would be assuming that congress may pass a title, and then, by a subsequent act, require less evidence to defeat that title than was required when it was first conveyed. The certificate would prevail against one claiming under the act of 1812, who had none, and who could not prove inhabitation, cultivation, or possession before the twentieth of Decem-

ber, 1803, because in that case there would on one side be no evidence of any fact which was requisite to confer title by the act of 1812.

2. It is maintained by the plaintiffs that Quinette having been a tenant in common with them, and having been in possession of the premises in controversy, the defendant Ewing, succeeding to Quinette's possession by a deed from him, held likewise as a co-tenant, and was estopped from denying the right of his co-tenants, the plaintiffs, to the possession of the disputed lot. The facts preserved in the record do not sustain this point. It appears that Ewing sued Quinette to recover possession of the lot; that he obtained a judgment, and that a writ for the delivery of the possession was in the hands of the officer when Quinette conveyed to Ewing. This we consider such an ouster as terminated the co-tenancy. An actual execution of the writ was not necessary to effect that object.

It is next insisted that the purchase by the defendant Ewing of Quinette's interest in this land, and the recitals in the deeds under which Ewing and Quinette held possession, amounted to such a recognition of the Vasquez title as estops Ewing from denying that there was such a title to this land. Inasmuch as Ewing claims by a distinct title, wholly disconnected with that of Vasquez, we hold that the doctrine of estoppel does not apply. There is nothing in the nature of an estoppel which precludes a party from setting up a title like that interposed by Ewing against the recovery of the plaintiffs: *Landes v. Perkins*, 12 Mo. 259; *Bligh's Lessee v. Rochester*, 7 Wheat. 535.

3. The plaintiffs, moreover, contend that the deed of the city to Lane inured to the joint use of himself and his co-tenants, inasmuch as he compromised the Vasquez title with the city, and by means of it obtained the commons title from her. Whatever equity there may be in the defendants, growing out of the compromise with the city, about which we express no opinion, it is evident that the petition filed in this cause is not so framed as to obtain any such relief. This action was brought to try the legal title of the parties; it is in the nature of an ejectment, and the allegations in the bill are only suited to that purpose. If the defendants have any equity, it must be sought in a proceeding so ordered as to show that they are entitled. Surely the defendants could not expect that the court would hold that they were legally entitled to the right acquired from the city, when they had neither paid nor offered to pay any portion of the sum by means of which Lane obtained her title.

Judge Ryland concurring, the judgment will be affirmed.

SURVEY OF COMMONS CONFIRMED BY CONGRESS VESTS PERFECT TITLE, the validity of which is derived from the act of confirmation. The doctrine of senior and junior equities and of relation back has no application to such cases; the elder confirmer has a better right than the junior, without reference to the date of the origin of their respective claims: *Dent v. Emmeger*, 14 Wall. 313, citing the principal case.

CONFIRMATION OF TITLE BY ACT OF CONGRESS is equivalent to a patent, and can only be defeated by a prior title out of the government: *Boatner v. Walker*, 30 Am. Dec. 723; *Slack v. Orillion*, Id. 724; *Jackson v. Astor*, 39 Id. 281, note 296.

EQUITY WILL NOT ENTERTAIN JURISDICTION of a cause involving title to land, where no ground of equitable relief is alleged: *Bussy v. McKie*, 16 Am. Dec. 628.

ABRAHAMS v. KRAUTLER.

[24 MISSOURI, 69.]

PARTY BUILDING ON HIS OWN LAND AND THEREBY USING WALL OF ANOTHER is not liable to the owner for one half the cost of the wall.

IF PARTY'S WALL IS USED BY ANOTHER TO OWNER'S INJURY, his remedy is an action for damages resulting from such injury.

ERROR from the St. Louis circuit court. The record does not present any facts except those stated in the opinion.

Knox and Kellogg, for the plaintiffs in error.

Hudson and Thomas, for the defendant in error.

By Court, SCOTT, J. It does not appear from anything contained in the record whether the wall, the half of whose value is sued for, stands on the dividing line between the plaintiffs and defendant, or whether it is entirely on the land of the plaintiffs. Nothing appearing on the subject, we must take it that the builders of the house occupied by the plaintiffs were not trespassers, and built upon their own land. If this be so, even then we do not see the principle on which the plaintiffs seek to make the defendant liable for one half of the cost of their wall. If the principle insisted upon be a correct one, then the use of the wall of the plaintiffs by the defendant, as a wall for his house, for any, no matter how short a time, would render him liable for half the cost of it. Though the wall might be an old one, in use for a great many years, yet if one afterwards uses it he will be liable for one half of the original cost. There may be statutes in England, and in some of the United States, which give an action like the present against one who uses the wall of another as a party-wall; but we have found no case at common

law which furnishes a ground for an action like this. If one's wall is used by another to his injury, he may undoubtedly have an action for such injury. The case of *Rankin v. Charles*, 19 Mo. 490 [61 Am. Dec. 574], contains a recognition of this principle. But if one of two adjoining proprietors puts a structure on his land, from which his neighbor derives a benefit without any injury to the owner of the structure, we know of no case which gives an action under such circumstances. If one makes use of his neighbor's fence as a part of his inclosure, committing no trespass and doing no injury, will an action lie against him for half the cost of the fence? The want of generosity in such conduct is a matter with which the law has nothing to do. If the plaintiffs have sustained any injury by the conduct of the defendant, his redress is an action for damages resulting from such injury. If the injury committed amounts to a nuisance, the law furnishes an appropriate remedy.

The other judges concurring, the judgment will be affirmed.

ASSUMPSIT DOES NOT LIE to recover damages for use of a wall standing on plaintiff's land, but used by an adjoining owner in building a house on his land, in the absence of any contract between the parties to pay for such use: *Bisquay v. Jeunelot*, 44 Am. Dec. 483, and case in note 485.

CURLE'S HEIRS AND ADMINISTRATOR v. EDDY.

[24 MISSOURI, 117.]

VERBAL AGREEMENT BETWEEN C. AND E. FOR E. TO HOLD LAND AS SECURITY FOR FUTURE ADVANCES, made by E. to C., is within the statute of frauds, and void.

MORTGAGES, TO SECURE FUTURE LIABILITIES, MUST EXPRESS THAT OBJECT. PAROL CONTRACT IS VOID, AS BEING CONTRARY TO STATUTE OF FRAUDS, when such contract provides that future advances made by E. to C. shall operate as an equitable lien or mortgage on the land of C., the title to which is in E.

APPEAL from the St. Louis land court. The opinion states the case.

Todd, and Krum and Harding, for the appellants.

Glover and Richardson, and J. E. Munford, for the respondents.

By Court, RYLAND, J. This is a suit by the heirs and administrator of Richmond J. Curle, deceased, against Joseph A. Eddy and another, to compel the defendants to convey to them

title to a certain tract of land described in the petition, pursuant to their written agreement to that effect, upon the payment of certain moneys specified in the agreement.

The defendants answer and state that they and Richmond J. Curle made a joint purchase of the land, and that Curle not being in funds, it was agreed that the defendants should advance the purchase money; that the title for Curle's interest should be conveyed to them as a security for the money advanced, and it was so conveyed under this oral contract; and that at the same time it was further orally agreed that the defendants should advance for Curle the money to pay taxes, costs, etc., and hold the title in security for these advances; which they aver they made, and which amount to six hundred and sixty-seven dollars. The answer also states that after the title was conveyed to the defendants it was agreed orally between said Curle and John Scott, and Beach & Eddy, and these defendants, that Beach & Eddy should advance to Curle & Scott, goods, wares, and merchandise for the purpose of carrying on their coal adventure; and that Curle proposed to Beach & Eddy, and these defendants, that these defendants should hold the title of said Curle's part of the land already conveyed to them until the money or goods advanced to Curle & Scott, by Beach & Eddy, should be repaid to them; that Beach & Eddy advanced to Curle & Scott goods, wares, and merchandise to a large amount; that Beach & Eddy sued the administrators of Curle, and recovered judgment for a large amount—upwards of eight thousand four hundred dollars; and that this judgment is not satisfied, but the money is still due to the said Beach & Eddy, said Eddy being one of the defendants to this suit. The answer avers that said Curle always, up to the time of his death, verbally recognized and acknowledged the right of these defendants to hold the title to his share of said land until said advances were paid. The answer avers that Richmond J. Curle did not in his life-time fully pay and reimburse to these defendants the sum of two thousand five hundred dollars, advanced by them for him, in order to pay the purchase money for the land. They say that there is justly due to these defendants the amount of money specified in the judgment in favor of Beach & Eddy, and also the amount for advances and costs and services rendered, amounting to one thousand one hundred dollars or one thousand two hundred dollars.

The court struck out that part of the answer in relation to the advances made by Beach & Eddy to Curle & Scott. There was

a hearing and finding of facts; no verbal agreement found—no finding as to the manner of acquiring the title by the defendants except what appears from the writing. The court decreed title to be made upon the payment of nine hundred and sixty-seven dollars, the amount allowed to defendants for advances and services, and from this part of the decree the plaintiffs bring the case here by writ of error; and the defendants bring it here by appeal because the court refused to allow the matters set up in the answer in regard to the agreement verbally made by Curle to the defendants to hold the land subject to the advances made by Beach & Eddy to Curle & Scott. The defendants contend that these advances were by agreement to be charges on the land, and that they are not bound in equity to convey, unless these sums be first paid back. The agreement is as follows: "Whereas we have this day received from Richard F. Barrett a bond for a deed, for the undivided half of forty arpens of land purchased of Dominique Burthe and others, dated the tenth of July, 1847; and whereas Richmond J. Curle is the owner of one third of said land conveyed by said Barrett, we bind ourselves, after the payment by said Curle of one note of five hundred dollars, and one note of two thousand dollars, given to Joseph A. and J. P. Eddy, and any other liabilities of said Curle to us, to convey to him his interest of one third of the above land. St. Louis, Mo., July 12, 1847. Signed J. A. & J. P. Eddy."

There are no verbal agreements found to exist between the parties. We suppose the act of the court below, cutting out, on motion, the defendant's claim to hold the land until the money, goods, wares, and merchandise advanced to Curle & Scott should be refunded, rendered no finding necessary as to any agreement on that matter. The two thousand five hundred dollars were found to have been paid by Curle in his life-time to the defendants. The main questions, then, in this case involve the correctness of the rulings of the lower court in regard to allowing the claim for taxes, fencing the land, and other costs accruing on account of the land, and the allowance for services of the defendants in attending to this matter. These are the subjects on the rulings in regard to which the plaintiffs complain.

The other party complain of the rulings cutting out their rights to hold the title subject to advances made by Beach & Eddy to Curle & Scott.

So far as regards the plaintiffs' objections, we think that the agreement to convey gives the right to demand that the taxes,

costs in defending title, fees in relation to the land, inclosures, etc., should be paid by Curle in his proper proportion to the defendants before he can demand the conveyance to be made to him. But so far as regards the services in attending to this business, we entertain great doubts of the propriety of such claim; but as the record shows that the plaintiffs were willing to admit three hundred dollars of these services, we will not reverse for allowing to them that amount. The words "and any other liabilities of said Curle to us" may be fairly understood to embrace all proper liabilities incurred by them in regard to the subject-matter of the contract. They did not know what these might be; therefore, under this expression, the payment of money by the defendants, as specified in the account presented by them, might properly form a debt from Curle to them. It becomes a liability resting on Curle, which must be discharged before he can require the title to be conveyed to him. We see no reason, therefore, to reverse the judgment below for anything alleged by the plaintiffs in their writ of error.

The defendants contend that by the parol agreement by Curle and themselves the advances made by Beach & Eddy to Curle & Scott became liens on the land of Curle, and that the court below should have required by its decree that this sum should be paid out of the land before the defendants can be equitably or legally required to convey. They say it is of the nature of a mortgage, at least an equitable mortgage; and that by the title remaining in the hands of defendants, taken in their name at first, they being the legal owners of the land, any advances made by Beach & Eddy to Curle & Scott are in law presumed to be made on this land, looking with an eye to this land as a means of payment in future.

By our statute no action shall be brought upon any contract for the sale of lands, tenements, hereditaments, or any other interest in or concerning them, unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith, or some other person by him lawfully thereto authorized. Now, in the opinion of this court the verbal agreement between Curle and these defendants to hold the land subject to the advances to be made by Beach & Eddy to Curle & Scott is within the provisions of this statute, and therefore not binding. Consequently it was proper in the court below to strike out so much of the defense as rested on this agreement.

There is much learning on the subject of mortgages to secure

future liabilities. But it seems that the mortgage for this purpose must express the object. The assistant vice-chancellor, in the case of *Walker v. Snediker*, 1 Hoff. 146, said: "It had been settled in equity, by repeated decisions, that a mortgage to secure future as well as present responsibilities is good; but the better opinion, if not decided law, is, that the mortgage must express the object. It is certain that it cannot be rendered available for future liability by a subsequent parol agreement." In *Jarvis v. Rogers*, 15 Mass. 392, Parker, C. J., said: "I admit that by the principles of the civil law, as they have been applied to mortgages, if the debtor pledges property for the security of a debt, and afterwards another debt is contracted to the same party, the creditor may retain until both debts are paid, provided no other security is given and no stipulation is made with respect to the second debt, tending to negative the presumption of an implied contract, that the pledge should be so retained. But this doctrine, I believe, is founded upon the presumption of such contract, and where there is no original contract to pledge, there can be no presumption with respect to a subsequent debt." Chief Justice Sharkey, in *Williams v. Stratton*, 10 Smed. & M. 426, said: "A deposit of all the title deeds, as a security for a debt created at the time the deposit is made, is generally recognized as constituting an equitable mortgage. Such equitable liens have met with very decided opposition in England, though they have been generally sustained; but it is admitted on all hands that they should not be extended beyond their present limit. Such a mortgage is in direct opposition to the statute of frauds, in regard to which we have said that we will create no exceptions not found in the statute. Lord Eldon said, in departing from the rule of the statute, there is no rule to go by, and it was essential that those who wished to render such securities valid should learn the utility of requiring two or three lines in writing." In *Shirts v. Dieffenbach*, 3 Pa. St. 234, it was held that there could be no such thing as a parol mortgage of lands in Pennsylvania: *Bowers v. Oyster*, 3 Pa. 239. The court of appeals of Kentucky, in *Van Meter v. McFaddin*, 8 B. Mon. 435, said: "We are strongly inclined to the opinion that the mere deposit of title deeds should not be regarded in this state as constituting any lien upon real estate. If permitted to have this effect, an interest in landed property is created by the contract of the parties not reduced to writing, in direct violation of the statute of frauds. Under our registry laws, the mere possession of the title deeds is of no real importance to the owner of the estate

He can procure office copies and use them without accounting for the absence of the original deeds, and that necessity which gave rise to this doctrine of implied or equitable lien having no existence here, the doctrine itself would be difficult to be maintained, either upon the ground of principle or of public policy." Lord Eldon said, in *Ex parte Hooper*, 19 Ves. 480, that "there never was a case where a man having taken a mortgage by legal conveyance was afterwards permitted to hold that estate as further charged, not by legal contract, but by inference from the possession of the deed." The same chancellor said, in *Ex parte Whitbread*, Id. 210: "Upon this subject I must always protest that the doctrine now prevailing ought never to have been established. The law previously was, that if there was a clear mortgage and a subsequent advancement, the latter could not be added without writing. When that was once determined, how could it be said that these deposits should have this effect?"

Without deciding whether there can be an equitable mortgage under our system of law or not, the court is fully satisfied that the parol contract—set up in this case by the defendants in order to make the future advances to Curle & Scott operate as an equitable lien or mortgage on the land of Curle, the title of which was then in the defendants—is void, being contrary to the statute of frauds and perjuries.

Upon this contract, then, which was contrary to the statute, the defendants cannot insist on tacking their debt against Curle & Scott to the amount of the purchase money originally advanced by them for Curle, and which has been paid back, and require this debt to be paid before they convey according to their written agreement. This view settles both cases, affirming the judgment below in all things; this court allowing the same time as the court below did. The plaintiffs must pay the costs of the case brought here on error, and the defendants the costs of the case brought here by them on appeal. The record in this case will be remitted to the court below, with instructions to carry into execution the decree which was made by that court, allowing to the parties the same time to perform their respective parts as decreed, counting from this day.

VERBAL AGREEMENT TO SECURE FUTURE ADVANCES for the payment of land is within the statute of frauds, and void: *O'Neill v. Capelle*, 62 Mo. 209, citing the principal case, which is cited to the same effect in 3 Reed on Stat. of Frauds, sec. 1014; and in Wood on Fraud, sec. 238, and Brown on Stat. of Frauds, sec. 287, to the point that a parol agreement to cover other or future indebtedness than that named in a mortgage is void.

MORTGAGES TO SECURE FUTURE ADVANCES, VALIDITY OF: See *Bank of Utica v. Finch*, 49 Am. Dec. 175, and note 178, collecting prior cases.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
NEW HAMPSHIRE

WEBSTER v. WEBSTER.

[33 NEW HAMPSHIRE, 18.]

TENANT FOR LIFE HAS NO RIGHT TO COMMIT WASTE UNDER RESERVATION of "all the right, title, and interest in and unto the above-named land and premises for and during my natural life."

MISTAKE IN DEED CANNOT BE SHOWN BY PAROL IN DEFENSE TO BILL FOR INJUNCTION to restrain commission in waste, brought by the grantee against the grantor, who reserved to himself a life estate.

EVIDENCE IS NOT COMPETENT ON QUESTION OF WASTE of the practice of the tenant for life in using the land when he was the owner in fee-simple.

TENANT FOR LIFE IS NOT BOUND TO RESORT FOR FUEL OR TIMBER, necessarily and properly used on the farm, to outlying lands owned by him, unconnected with and not belonging to the farm.

BILL in equity by Levi B. Webster, alleging that the defendant, Isaac Webster, jun., had conveyed to the complainant a farm by a deed containing the words, "reserving all the right, title, and interest in and unto the above-named land and buildings for and during my natural life;" that on the same day the complainant reconveyed the farm to the defendant for life, without any provision concerning waste; and that the defendants, Webster and one Collins, had cut and split into fuel a large number of oak-trees, fit for timber, and threatened to cut down and carry away all of the wood and timber on the land. There was a prayer for an injunction to restrain waste, and for an account of the trees already cut. The defendants alleged that by virtue of the reservation in his deed, Isaac Webster, jun., held the premises without impeachment for waste, and that it was agreed between the parties that Isaac should have the same control over the farm as previously.

and the right to cut and carry off wood and timber as he pleased. There were also allegations of fraud, and of mistake of the draughtsman, one George, in drawing up the deeds, and denials that the trees cut were fit for timber, that any waste had been committed, and that the defendants had threatened to cut all the wood and timber on the land. Evidence was introduced by both parties to show the kind, quality, number, and value of the trees cut, and of the threats of Isaac Webster, jun.; and by the plaintiff to show that before the conveyance, Isaac had usually collected decayed and fallen wood for fuel, instead of cutting growing trees, and had obtained part of his fuel from several pieces of outlying woodland owned by him, unconnected with the farm. The defendants also introduced evidence of the agreement between Isaac and Levi Webster, pursuant to which the deeds were made, and of the mistake of the draughtsman in drawing them up.

Wells and Bacon, for the plaintiff.

Marston and Stanyan, for the defendants.

By Court, PERLEY, C. J. The deed of Isaac Webster, jun., to Levi B. Webster, and the deed of Levi to Isaac, bear the same date, and were intended to carry into effect the same bargain and arrangement, and are to be construed together. The deed from Levi to Isaac reconveys an estate for the life of the grantee, without anything to indicate that the life estate should be without impeachment for waste.

The deed from Isaac to Levi conveys the land in fee-simple, with the usual covenants of warranty, and contains this reservation: "Reserving all the right, title, and interest in and unto the above-named land and premises for and during my natural life." Does this reservation make the estate for life of Isaac Webster dispunishable for waste?

It would seem that no particular form of words is necessary to make an estate for life without impeachment for waste: *Goodright v. Barron*, 11 East, 220.

Timber and wood standing and growing on land is in contemplation of law part of the land itself. When land is conveyed, the wood and timber growing on it are conveyed as parcel of it. The wood is not a product of the thing conveyed; it does not issue out of the thing conveyed, in the nature of a crop or of increase. Tenant for life may take wood for his necessary fires and timber for repairs; otherwise he could not use and enjoy his estate. But the use of the land, the con-

trol and enjoyment of the land for life, imply no power to dispose of the wood and timber for other purposes, any more than to sell off the buildings or the soil itself.

A deed conveying all the right and title of the grantor in the land conveys the land itself, and this is the usual and proper form employed to release or quitclaim an estate in land: *Hall v. Chaffee*, 14 N. H. 215; *Mills v. Catlin*, 22 Vt. 98; *Barton v. Morris*, 15 Ohio, 408; *Tillinghast v. Frye*, 1 R. I. 53. A deed conveying all the right, title, and interest of the grantor for the life of the grantee would convey the land for his life, and would have the same effect, and no higher, than if the deed had conveyed the land for life. When Isaac Webster reserved in his deed all his right, title, and interest in and to the land and buildings conveyed, he employed the usual and proper words to reserve the land itself for his life, and no inference can be drawn from the language of the deed that anything more than a life estate was understood or intended to be reserved. General words in a lease for years will not give power to fell timber.

The owner leased the manor of Swillington for eighty years, "*cum boscis, boscorum renditionibus, magno mœremio, magnis arboribus, mineris carbonum*, etc., to hold, in *tam amplis modo prout* the lessor *habuit vel jure habere potuit*:" held, that the lessee could not fell timber: *Lord Darcy v. Askwith*, Hob. 234.

Where land is granted, reserving to the grantor the use and control of the lands during his natural life, the reservation gives to the grantor but an estate for life in the land, and he has no right to cut and take timber trees therefrom for sale: *Richardson v. York*, 14 Me. 216.

The reservation in the deed of Isaac Webster of "all the right, title, and interest in and unto" the land, was the same in legal effect as a reservation of the land itself for his life, and gives no right to commit waste.

While the deed stands as the act and contract of the parties, parol evidence cannot be received to contradict or control it. This elementary general rule has been applied to the case of reservations in deeds: *Swick v. Sears*, 1 Hill (N. Y.), 17; *Noble v. Bosworth*, 19 Pick. 314.

But a mistake in a deed or other written instrument may be rectified in equity. And where an instrument is drawn and executed which is intended to carry into effect a previous agreement, but which, by mistake of the draughtsman, either as to fact or law, does not fulfill that intention, equity will correct the mistake: 1 Story's Eq. Jur., sec. 129; *Wooden v. Haviland*, 13

Conn. 101; *Stedwell v. Anderson*, 21 Id. 139; *Lavender v. Lee*, 14 Ala. 688; *Stone v. Hale*, 17 Id. 557 [52 Am. Dec. 185].

And that is the case set up by the answer. And there is evidence, standing uncontradicted and unexplained, sufficient to satisfy us that the agreement between Isaac and Levi Webster was that Isaac should have the right to cut and sell off wood and timber as he pleased, and that by the blunder and mistake of George, the draughtsman, this right was not given by the deed.

But the evidence does not show that the conveyance was obtained by fraud. The question then arises, whether the defendants can set up this mistake by way of defense to the complainant's bill, without having the deed first corrected by a decree in a separate proceeding instituted for that purpose.

It has been sometimes stated in general terms that in equity a mistake in a written instrument may be shown by parol proof, and relief granted to the injured party, whether he sets up the mistake affirmatively or as a defense. There is such a remark in *Gillespie v. Moon*, 2 Johns. Ch. 596 [7 Am. Dec. 559]. Chancellor Kent there cites several cases: *Joynes v. Statham*, 3 Atk. 888; *The Marquis Townshend v. Stangroom*, 6 Ves. 333; *Ransbottom v. Gosdon*, 1 Ves. & B. 165; and *Flood v. Finlay*, 2 Ball & B. 9. These cases were all bills for the specific performance of contracts, and the chancellor adds: "This is only one class of cases; there is another class, in which the parol proof is to correct mistakes in bonds, deeds, settlements, mortgages, and generally in all contracts and agreements, and where the proof is introduced to aid the plaintiff in his bill as well as to aid the defendant in his defense." From the broad expressions here used, it might be inferred that, as a general rule, a defendant might in equity show by parol a mistake in the deed or other instrument under which the defendant claimed to defeat his bill. But all the cases, so far as they have come to my knowledge, in which a defendant has been allowed to show by parol evidence a mistake in a written instrument to defeat the plaintiff's bill, have been where the aid of the court was sought to carry into effect by specific performance the written contract in which the mistake was proved. In the language of *Reeh v. Jackson*, 6 Ves. 334, the plaintiff sought "to obtain by a decree of the court a further security, or more ample interest than the party was in possession of by the paper itself."

In such case the evidence is not introduced to contradict the writing or control its legal effect, but a matter collateral to the writing is shown by parol, which is allowed to defeat the appli-

cation of the plaintiff for the equitable intervention of the court in his favor. The contract remains untouched, and in full force; the court receive the parol evidence, not to correct the written instrument, but to show that the plaintiff ought in equity to be left to rely upon it as it stands, and should have no aid from the equitable jurisdiction of the court to give him, by a decree for specific performance, a larger legal estate or interest than he has under the writing, which is proved to be erroneous.

In *Clowes v. Higginson*, 1 Ves. & B. 527, it is said by Plumer, vice-chancellor, that the parol evidence "is introduced, not to explain or alter the agreement, but, consistently with its terms, to show circumstances of mistake or surprise, making a specific performance, as in the case of fraud, unjust."

In the present case the plaintiff stands on his legal title, conveyed to him by the deed of Isaac Webster, one of the defendants. He does not set up the deed as an executory contract, and ask aid from the equitable jurisdiction of the court to carry it into effect specifically, and so give him an estate and interest in the land. He, to be sure, complains of an injury done, and a further injury threatened to his legal rights under the deed, and asks aid from the equitable jurisdiction of the court to protect his legal rights; but his title is vested and his legal right complete under the deed. And in this respect his case differs from all those in which we have seen parol evidence admitted to show a mistake in a written instrument for the purpose of defeating the plaintiff's bill.

Courts of equity have proceeded with great caution in the exercise of their jurisdiction for the correction of mistakes in written instruments. No case has occurred to us in which the plaintiff has relied in his bill on a vested legal title derived under a deed, and the defendant has been allowed to introduce parol proof of a mistake in the deed by way of defense to the bill, leaving the deed uncorrected and in full force. The course has been for the party relying on the mistake to bring a bill and have a decree correcting it. This, we think, is the safe and correct practice; and the evidence taken in this cause cannot be received to show a mistake in the deed under which the plaintiff derives his title.

In a suit at law, what is waste is a question of fact for the jury. In equity, the court must find the facts, whether waste has been committed or threatened. The general principle governing the question is that the tenant shall not be permitted to

do any act of permanent injury to the inheritance, except to take his reasonable estovers: 1 Greenl. Cru. 116, note; *Chase v. Hazellon*, 7 N. H. 171; *Pyncheon v. Stearns*, 11 Met. 304 [45 Am. Dec. 207].

Whether cutting any particular kind of trees for fuel is waste would depend upon the situation and circumstances, and perhaps, in some instances, on the custom of the district of country in which the land lay. Where oak-trees are abundant and are in common use for fuel, it is not waste to cut them for that purpose: *Paddelford v. Paddelford*, 7 Pick. 152; and in this country no act of the tenant amounts to waste unless it is or may be prejudicial to the inheritance.

Evidence of Isaac Webster's former practice in the manner of procuring the fuel used on the farm was not competent on the question of waste. His rights would depend on his deed, construed according to the law of the land, and could not be extended or restrained by showing how he had used the land when he was the owner in fee-simple. Nor was he bound to resort, for any part of the fuel or timber necessarily and properly used on the farm, to outlying lands that did not belong to it. The land conveyed was a farm, described as such in the deed; the question is, whether the farm was used in a proper and husband-like manner, and that question could in no way depend on the circumstance that the defendant had other unconnected land from which he might have taken wood and timber if he had thought proper.

The evidence shows that the defendants cut about ten cords of wood, and drew it to the house on the premises for fuel. There were about one thousand cords of wood growing on the land. The quantity cut does not appear to be unreasonable for a year's supply. As to the quality and value of the trees cut, the evidence is somewhat contradictory. The inference we draw from the whole is, that about five small oak-trees were cut and split into fuel that might have answered for certain descriptions of timber; but the quantity would have been small, and the salable value trifling, and it would have been bad economy to attempt to select these few sticks and dispose of them as timber.

There were other trees on the farm, scrub-oaks, birch, and white maple, that might have been taken for fuel; but they were more difficult to get, and some of the witnesses say the wood for fuel could not have been cut with less injury to the farm in any other way. The tenant was entitled to take out of the thousand cords on the farm good fuel, and such as was conveniently sit-

uated. The evidence fails to show that any substantial injury was done to the inheritance by cutting these ten cords of wood; certainly no amount of timber was cut which would warrant us in referring the cause to take an account.

But the defendant Isaac Webster asserts the right under the reservation in his deed to cut wood and timber as he may think fit, and the evidence shows that he has proposed to sell and cut large quantities, and the injunction must be made perpetual against his committing waste, unless he desires the cause should be retained in order that he may have opportunity to bring a bill to correct the alleged mistake in the deeds. If this plaintiff, in answer to such a bill, should positively deny the mistake, it might be questionable whether the evidence taken in this cause would be sufficient to overcome the denial.

TENANT FOR LIFE MAY CUT ONLY SO MUCH WOOD AS IS NECESSARY FOR FUEL AND REPAIRS: *Clemence v. Steere*, 53 Am. Dec. 621; *Johnson v. Johnson*, 29 Id. 72. He cannot cut and sell wood or timber, however, to raise money to pay for repairs, however necessary or indispensable: *Dennett v. Dennett*, 43 N. H. 500; but he may take reasonable fuel for himself and family residing upon the land, including persons employed in the cultivation of the land: *Smith v. Jewett*, 40 Id. 533. The last two cases cite the principal case.

ACT MUST BE PREJUDICIAL TO INHERITANCE TO CONSTITUTE WASTE: *Pyncheon v. Stearns*, 45 Am. Dec. 207; but whatever is done which tends to the destruction of the inheritance, or the impairing of its value, is waste: *Jackson v. Brownson*, 5 Id. 258; *Wilds v. Layton*, 12 Id. 91; *Duvall v. Waters*, 18 Id. 350; *Owen v. Hyde*, 27 Id. 467; *Clemence v. Steere*, 53 Id. 621; *Smith v. Sharpe*, 57 Id. 574. The condition of the country is to be considered in determining what is waste: *Ward v. Sheppard*, 2 Id. 625; *Findlay v. Smith*, 8 Id. 733; *Jackson v. Brownson*, *Owen v. Hyde*, *Pyncheon v. Stearns*, *Clemence v. Steere*, *supra*.

PILLSBURY v. LOCKE.

[33 NEW HAMPSHIRE, 96.]

MEANING OF WORDS AND TERMS OF CONTRACT IS TO BE DETERMINED, in the absence of fraud, by their known or proved signification, and not by the declarations of the parties at the time the contract was made.

MEANING OF TERM "SHIP TIMBER," as used in a contract by which the defendant was to take all the white-oak upon the plaintiffs' lot that was suitable therefor, cannot be shown by declarations of the defendant, at the time of making the contract, that the vessel for which he designed the timber was a small-sized one, and that he wanted the small timber upon the lot to put into the top of the vessel.

MEMORANDUM-BOOK IS ADMISSIBLE AS ORIGINAL ENTRY to show the quantity of timber, where a witness testifies that he took down upon a slate the quantity in each stick, and added up the several quantities, and

gave their sum to his wife or daughter, who entered it in his presence in the book, which the witness then examined to see if the entry was correct.

QUANTITY OF TIMBER IN DISPUTE MAY BE SHOWN by the size of the team which hauled it and the condition of the roads, and the testimony of a witness who had been over the lot where it grew and described the size of the trees.

ASSUMPERT. The questions in the case were concerning the admission of certain evidence. The parties had entered into a contract by which the defendant had agreed to take all the white-oak upon the plaintiffs' lot that was suitable for "ship timber," and to show the meaning of this term, a witness was permitted to testify, on behalf of the plaintiffs, that at the time the contract was entered into the defendant said that the vessel for which he designed the timber was a small-sized one, and that he wanted the small timber upon the lot to put into the top of the vessel. The defendant, in explanation of what he meant by a "small-sized vessel," proposed to show that at the time the declarations were made he had contracted with Fernald & Pettigrew to furnish timber for a certain vessel of a certain size, and that the timber in question actually went into it, but the evidence was held inadmissible. To prove a quantity of timber in dispute, which one Ellison hauled, the plaintiffs, against the objection of the defendant, introduced in evidence a memorandum-book, and Ellison testified that he passed by his house in drawing the timber, and as he drew each load, he took down upon a slate the quantity in each stick, and added up the several quantities, and gave the sum to his wife or daughter, who entered it in his presence in the book, which he then examined to see if the entry was correct. Bills for getting out and molding the timber were also shown to a witness for the defendant, who did the work, and who stated that they were made out by him and were correct, and were allowed to be read as a part of the testimony of the witness upon cross-examination. To show the quantity of timber that was hauled by one Batchelder, he was permitted by the court to state the size of his team and the condition of the road. The court also permitted a witness, who had been over the plaintiffs' lot, to describe the size of the trees. The plaintiffs had a verdict which the defendant moved to set aside.

Peavey and Christie, for the plaintiffs.

Wheeler, for the defendant.

By Court, EASTMAN, J. Several rulings were made by the court in the progress of the trial of this cause, and we think they may all be sustained except the first.

The parties had entered into a contract by which the defendant was to take all the white-oak upon the plaintiffs' lot that was suitable for "ship timber." As tending to show the meaning of the term "ship timber," a witness was permitted to testify that at the time the contract was entered into the defendant said that the vessel for which he designed the timber was a small-sized one, and that he wanted the small timber upon the lot to put into the top of the vessel.

It is a principle too well settled to require discussion, that when a contract is reduced to writing, any parol agreement made at the time, varying the terms of the contract, cannot be shown by the parties thereto to change it; and evidence tending to show any such change or variation is inadmissible.

Among those who deal in the article, the phrase "ship timber" has undoubtedly a somewhat definite meaning, as much so as "merchantable boards," or "cord-wood," or the like; and the declarations of the purchaser at the time of discussing the bargain, as to the uses to which he intends to put the articles, cannot be competent to change or vary the signification of the terms finally used in the contract. The meaning of words and terms used in making a contract or agreement must, in the absence of fraud, be determined by their known or proved signification, and not by the statements of the parties, or the conversations that they may have at the time the contract is made. If one phrase in a contract may be controlled or explained by the declarations of a party at the time it is entered into, then may others; and the real contract made may be thus materially changed.

Suppose a person, in contracting for the ship timber on a lot, should say that he wished to use some small sticks for the making of a skiff or a row-boat; or an individual purchasing cord-wood, should remark that he desired the limbs and brush for summer use—would such evidence be competent as tending to show what the terms "ship timber" and "cord-wood" mean? Evidently not. If one purchasing the ship timber on a lot should take therefrom other timber not answering the description of that purchased, he would be liable therefor, but not on the contract. And so with this defendant; if he has converted to his use what he did not buy, he is answerable for the same, but not by virtue of the agreement made. This ruling of the court was wrong.

As to the next point; for the same reasons the defendant's proposition to show his contract with Fernald & Pettigrew, and the size of a certain vessel, could have no legitimate tendency to show the meaning of the terms he used. The plaintiffs were to judge from his language, and not from what he had done, or from what was passing in his mind.

The memorandum-book was admissible. It was so far an original entry as not to be objectionable on that account: *Haven v. Wendell*, 11 N. H. 112; *Watson v. Walker*, 23 Id. 471; *Webster v. Clark*, 30 Id. 245. And the objection to the bills used upon the trial comes within the same principle.

Batchelder's testimony was rightly admitted. The size of the team and the condition of the roads had a tendency to show the quantity that he drew.

The testimony of the witness who had been over the lot, and who described the size of the trees, was also competent. Though slight, it had some tendency to show what amount was on the lot.

There is no new principle involved in any of these rulings, and it is unnecessary to go further than to say that they appear to the court to be correct. For error in the first ruling, however, the verdict must be set aside.

MEMORANDUM AND ACCOUNT BOOKS, ADMISSIBILITY OF, IN GENERAL: See *Union Bank v. Knapp*, 15 Am. Dec. 181, and note considering the subject; *Atwell v. Miller*, 61 Id. 294, and prior cases in note. Entries made in the usual course of business upon the books of others, by persons whose duty it is to make them, and who testify to their correctness when made, but who have now forgotten the transactions, are competent to be read in evidence: *State v. Shinborn*, 46 N. H. 504; and entries and other memoranda, not made in the course of business, but merely for the convenience of the party making them, may likewise be read: *Pembroke v. Allenstown*, 41 Id. 369, both citing the principal case.

ADMISSIBILITY OF MEMORANDUM AND ACCOUNT BOOKS, WHERE ENTRIES HAVE BEEN TRANSCRIBED THEREIN: See *Ingraham v. Bockius*, 11 Am. Dec. 730; *Foraythe v. Norcross*, 30 Id. 334; *Sickles v. Mather*, 32 Id. 521, and notes to these cases; note to *Union Bank v. Knapp*, 15 Id. 196. It is no objection to the admission of entries that they were first made upon a slate by two persons during the day, and at night copied by one of them into the books, provided the original entries and copying are verified by the parties making them: *State v. Shinborn*, 46 N. H. 504; nor is the character of account-books as those of original entries destroyed by the fact that the charges in the first instance were made on a slate and were transferred to the books within a reasonable time: *Redlich v. Bauerlee*, 98 Ill. 138; the minutes on the slate were mere memoranda, to assist the memory until the items were transferred to the books, and were not intended to be permanent—both citing the principal case.

WINKLEY v. FOYE.

[38 NEW HAMPSHIRE, 171.]

ONE WHO DEPOSITS MONEY WITH ANOTHER TO BE APPLIED TO THIRD PERSON'S BENEFIT MAY COUNTERMAND APPROPRIATION at any time before it has been applied to that purpose, or before such an engagement has been entered into between the depository and the one for whose benefit the money was originally deposited as creates a privity between them, and amounts to an appropriation.

VERDICT WILL BE SET ASIDE FOR ADMISSION OF IMMATERIAL EVIDENCE, when such evidence may have excited prejudices or raised false impressions in the minds of the jury.

ASSUMPSIT to recover a sum of money received by the defendant to the plaintiff's use. The opinion states the case.

Samuel M. Wheeler, for the plaintiff.

Christie and Kingman, for the defendant.

By Court, FOWLER, J. Where a consignment or remittance is made, with instructions to pay over the proceeds to a third person, the appropriation is not absolute, for it amounts to no more than a mandate from a principal to his agent. It may be revoked at any time before it is executed, or at least before any engagement is entered into by the mandatary with the third person to execute it for his benefit; and it will be revoked by any prior disposition of the property inconsistent with such execution: 2 Story's Eq. Jur., secs. 972, 1046, 1036 a, 1036 b, 1045; *Scott v. Porcher*, 3 Meriv. 652, 664; *Acton v. Woodgate*, 2 Myl. & K. 492.

Where goods are delivered to a bailee to be delivered over to another, if the delivery over is not for a valuable consideration the bailor, at any time before the actual delivery, may countermand his bailment, and after such countermand a delivery over by the bailee will not be good: Story on Bailm., sec. 104; Bacon's Abr., Bailment, D.

Where one person remits a bill to another for the use of third persons, it is the right of the remitter to give and countermand his own directions respecting the bill as often as he pleases, and the person to whom the bill is remitted will still hold it, and its amount when received, for the use of the remitter himself, until, by some arrangement entered into by himself with the person who is the object of the remittance, he has precluded himself from so doing, and appropriated the remittance to the use of such person: *Williams v. Everett*, 14 East, 597.

Until both the party receiving a consignment or remittance has done some act recognizing the appropriation of it to the particular purposes specified, and the person for whose benefit it was remitted or consigned has signified his acceptance of the consignment or remittance, so as to create a privity between them, the property or proceeds remain at the risk and on account of the remitter or owner, and subject to his order: *Tiernan v. Jackson*, 5 Pet. 601.

The case before us finds there was some evidence from which it would have been competent for the jury to find that the money in controversy belonged to the plaintiff, and that he, in his own name, delivered it to the defendant, to be applied in full or part payment, as the case might be, of the debt and costs of a suit brought by the defendant against the son and son-in-law of the plaintiff, but that the money never had been so applied, and that before the commencement of the present suit the plaintiff had demanded the money of the defendant. Now, if this were the plaintiff's money, deposited by him with the defendant for a particular purpose, and he were under no legal obligation thus to appropriate it, he had a right to countermand that appropriation of it and recall the money at any time before it had been applied to that purpose, or before such an engagement had been entered into by the defendant with the son and son-in-law of the plaintiff, for whose benefit the money was originally deposited, as created a privity between them, and amounted to an application of it to their use. Anything less than that was unimportant and immaterial, so far as the plaintiff's right to recall the money, and if not delivered up on demand to recover the same in the present suit, was concerned. Until that had been done, the money remained the property of the plaintiff, and subject to his control.

But the court permitted the defendant to show that on the trial of his suit against the plaintiff's son and son-in-law he offered to apply the money, so far as it would go, but they declined to have it applied in that suit, and it never was so applied. This evidence had no tendency to prove that the plaintiff was not entitled to recover back the money, if it originally belonged to him, for which purpose it seems to have been admitted. The offer to apply it according to its original appropriation by the plaintiff, for the benefit of his son and son-in-law in the defendant's suit against them, having been refused by them, was wholly immaterial, so far as the plaintiff's rights were concerned. Had the son and son-in-law accepted the offer,

so as to have created a privity between themselves and the defendant, the testimony showing that fact would have been material and competent. As it was, the defendant might as well have shown almost any other fact in evidence as this unaccepted offer to apply the money. As evidence to rebut and control the plaintiff's right to recover back his own money, it was clearly incompetent. On that question it was immaterial, and therefore inadmissible. What instructions may have been given in relation to it does not very clearly appear from the case; but the fact that the question of its admissibility was reserved and transferred would indicate such importance to have been attached to it that, in the opinion of the judge who tried the cause, it may have influenced the decision of the jury.

The evidence, then, having been incompetent and inadmissible, although immaterial upon the question on which it was admitted, we think the verdict, which may have been influenced by it, should not be permitted to stand. As well observed by the court in a former decision in this suit, *Winkley v. Foye*, 28 N. H. 518, "evidence which has no legitimate bearing may still have an unfavorable influence upon a claim or defense. It may be calculated to excite prejudices, or raise false impressions, and in such cases its admission may furnish good ground to set aside a verdict." Such would seem to have been the character of the evidence improperly admitted in this case. It had no legitimate bearing, and, whatever the instructions in regard to it may have been, it was well calculated to prejudice the minds of the jury against the plaintiff's right to recover.

Verdict set aside, and new trial granted.

ADMISSION OF IRRELEVANT OR IMMATERIAL EVIDENCE AS GROUND FOR NEW TRIAL OR REVERSAL OF JUDGMENT.—It is well settled by numerous cases that a verdict will not be set aside, a judgment reversed, or a new trial granted because irrelevant or immaterial evidence was admitted which does not affect the result or has not prejudiced the party complaining: *Donley v. Camp*, 22 Ala. 659; S. C., 53 Am. Dec. 274; *Seabury v. Doe ex dem. Stewart*, 22 Id. 207; S. C., 53 Am. Dec. 254; *Wallace v. State*, 28 Ark. 531; *Clark v. Lockwood*, 21 Cal. 220; *Mills v. Barney*, 22 Id. 240; *Kidd v. Teeple*, Id. 255; *Zeigler v. Wells*, 28 Id. 263; *Porter v. Peckham*, 44 Id. 204; *Bee v. San Francisco etc. R. R.*, 46 Id. 248; *Crosby v. Fitch*, 12 Conn. 410; S. C., 31 Am. Dec. 745; *Lee v. Baldwin*, 10 Ga. 208; *Mitchell v. Rome R. R.*, 17 Id. 574; *Churchill v. Corker*, 25 Id. 479; *Seibel v. Vaughan*, 69 Ill. 257; *Paris etc. R. R. v. Henderson*, 89 Id. 86, 89; *Wayne Co. v. Berry*, 5 Ind. 286; *Latterett v. Cook*, 1 Iowa, 1; S. C., 63 Am. Dec. 428; *McKenzie v. Kitter*, 27 Iowa, 254; *Whalley v. Small*, 29 Id. 238; *Walsh v. Aetna Life Ins. Co.*, 30 Id. 133; *Union Agricultural etc. Association v. Neill*, 31 Id. 95; *Brayley v. Ross*, 33 Id. 505; *Smart v. Easley*, 5 J. J. Marsh. 214, 216; *Merriam v. Mitchell*, 13 Mo. 439; S. C., 23

Am. Dec. 514; *Watson v. Propr's of Lisbon Bridge*, 14 Me. 201; S. C., 31 Am. Dec. 49; *Skowhegan Bank v. Cutler*, 52 Me. 509; *Inhabitants of Smithfield v. Inhabitants of Waterville*, 64 Id. 412; *Buddington v. Shearer*, 22 Pick. 427, 430; *Barry v. Bennett*, 7 Id. 354; *Packard v. City of New Bedford*, 9 Allen, 200; *Lynd v. Pickett*, 7 Minn. 184; *Illingworth v. Greenleaf*, 11 Id. 235; *Winona de R. R. v. Waldron*, Id. 515; *Browning v. State*, 33 Miss. 47; *Hamblett v. Hamblett*, 6 N. H. 333, 342; *Clement v. Brooks*, 13 Id. 92, 97; *Swoasemcot Machine Co. v. Walker*, 22 Id. 457; S. C., 55 Am. Dec. 172, 175; *School District v. Bragden*, 23 N. H. 507; *Edgerty v. Emerson*, Id. 555; S. C., 55 Am. Dec. 207; *Titus v. Ash*, 24 N. H. 319, 331; *Tucker v. Peaslee*, 36 Id. 167; *Page v. Parker*, 40 Id. 47; *Hatch v. Hart*, Id. 93; *Blodgett Paper Co. v. Farmer*, 41 Id. 398; *Winship v. Enfield*, 42 Id. 197; *Carter v. Beals*, 44 Id. 406; *Adams v. Blodgett*, 47 Id. 219, 223; *Vandevoort v. Gould*, 36 N. Y. 639, 644; *Quincy v. Young*, 5 Daly, 327; *Ahern v. Standard Life Ins. Co.*, 2 Sweeney, 441; *May v. Gentry*, 4 Dev. & B. L. 117, 119; *People's Nat. Bank v. McKethan*, 84 N. C. 582; *Dikeman v. Parrish*, 6 Pa. St. 210; S. C., 47 Am. Dec. 455; *Forbes v. Howard*, 4 R. I. 364; *Peters v. Barnhill*, 1 Hill (S. C.), 234; *McCall v. Brock*, 5 Strobb. 119; *Campbell v. Wilson*, 6 Tex. 379; *Linard v. Crossland*, 10 Id. 462; S. C., 60 Am. Dec. 213; *Johnson's Ex'x v. Jennings's Adm'r*, 10 Gratt. 1; S. C., 60 Am. Dec. 323; *Southern Mut. Ins. Co. v. Trear*, 29 Gratt. 255; *McElroy v. Eaw Claire Lumber Co.*, 57 Wis. 189. See the principal case cited on this point in *Tucker v. Peaslee*, 36 N. H. 181; *Page v. Parker*, 40 Id. 64; *Hatch v. Hart*, Id. 100; *Blodgett Paper Co. v. Farmer*, 41 Id. 405; *Winship v. Enfield*, 42 Id. 211.

The converse of this proposition is true, and if the admission of such evidence has a tendency to prejudice the minds of the jury, the judgment will be reversed and a new trial granted: *Clark v. Vorce*, 19 Wend. 232; *Farmers' & Mech. Bank v. Whinfield*, 24 Id. 419, 427; *Myers v. Malcolm*, 6 Hill, 292; S. C., 41 Am. Dec. 744; *Winkley v. Foye*, 28 N. H. 513, 519; *Cook v. Brown*, 34 Id. 400; *Center v. Center*, 38 Id. 318; *Boyce v. Cheshire R. R.*, 42 Id. 97, 100, citing the principal case; *Ellis v. Short*, 21 Pick. 142; *Patton v. Porter*, 3 Jones L. 539; *Huberg v. State*, 3 Minn. 262; *Massengill v. Shaulden*, 1 Heisk. 357; *Heessin v. Heck*, 88 Ind. 449; *Dougherty v. Vanderpool*, 35 Miss. 165; *Smith v. Russ*, 22 Wis. 439. "To authorize the reversal of a judgment for error in admitting irrelevant evidence," says Moncure, P., in *Southern Mut. Ins. Co. v. Trear*, 29 Gratt. 255, 250, "not only must the evidence be irrelevant, but it must be of such a nature as that its admission may have prejudiced the adverse party." In *Buddington v. Shearer*, 22 Pick. 427, 430, Shaw, C. J., said: "Where evidence is given solely for the purpose of proving a fact which upon examination is found to be unnecessary to be proved, and such evidence has no tendency to influence the minds of the jury upon other points, the verdict ought not to be set aside, though such evidence should not be legally competent." Dixon, C. J., in *Smith v. Russ*, 22 Wis. 439, thus states the doctrine: "I think the correct rule in regard to the granting or refusing of a new trial for the admission of irrelevant or improper evidence is this: where the exceptional evidence is of little weight compared with the rest of the proof, and the latter clearly justifies the finding of the jury, a new trial will not be granted; but it must in all cases appear very satisfactorily that the verdict must and ought to have been the same, whether the questionable evidence was admitted or not." To use the language of Cowen, J., in *Farmers' & Mech. Bank v. Whinfield*, 24 Wend. 419, 427, in speaking of this evidence, "so long as the chance is equal that it may have had some effect one way or the other, the party is entitled to the benefit of

the principle that irrelevant testimony should be shut out from the jury;" approved in *Hoberg v. State*, 3 Minn. 262. If no use was made of testimony immaterial to the issue, it may be fairly presumed not to have influenced the minds of the jury, and will be no ground for disturbing the verdict: *Van Cort v. Van Cort*, 4 Edw. Ch. 621. So the admission of immaterial or irrelevant evidence furnishes no ground for a new trial, if the jury are instructed to disregard it: *Whitney v. Bayley*, 4 Allen, 173; *Smith v. Whitman*, 6 Id. 562; *State v. Kingsbury*, 58 Me. 238. They will be presumed to have obeyed the instruction, at least in a civil case. The admission of irrelevant testimony is no ground of objection, if it be afterwards rendered pertinent by the introduction of other testimony: *Black v. Camden etc. Co.*, 45 Barb. 40; *Rucker v. Hamilton*, 3 Dana, 36; and where irrelevant testimony is admitted solely to remove a ground of prejudice caused by the irrelevant testimony of the objecting party, its admission is not only not a ground for a new trial, but proper in the discretion of the judge trying the cause to the impartial ordering of the trial: *Wilson v. Hampden F. Ins. Co.*, 4 R. I. 159. The admission of immaterial evidence which would work no injury, and furnish no ground for reversing the judgment, becomes a ground of reversal if subsequent testimony of the unsuccessful party upon a material point is inconsistent with it, and may have had weight in discrediting such testimony, and leading to the judgment appealed from: *Wilson v. Wilson*, 4 Abb. App. Dec. 621.

The general rules as given above obtain in case immaterial evidence is introduced which is otherwise incompetent; the admission of such evidence being no ground for objection if the minds of the jury could not have been prejudiced by it: *Norris v. Badger*, 6 Cow. 449; *Supervisors of Chenango v. Birdsell*, 4 Wend. 453, 458; *Vallance v. King*, 3 Barb. 548; *Lamb v. Camden etc. R. R.*, 2 Daly, 454; *Bennett v. Austin*, 5 Hun, 536; *Prince v. Shepard*, 9 Pick. 176, 183; *Bragg v. Boston etc. R. R.*, 9 Allen, 54; *Jewett v. Stevens*, 6 N. H. 80; *Polleys v. Ocean Ins. Co.*, 14 Me. 141; *Horton v. Williams*, 21 Minn. 187; *Stephens v. Crawford*, 1 Ga. 574; S. C., 44 Am. Dec. 680.

We are not sure but the broad ground ought to be taken that the admission of immaterial evidence must result in the granting of a new trial. Were this rule once established, courts would soon begin to pay some decent respect to the rules of evidence, and would exclude all testimony which it would be improper to consider in the final determination of the case. At the present time the appellate courts are very loath to reverse a judgment because of the admission of immaterial evidence, and this would result in very little wrong if there were any means of knowing what influence the objectionable evidence in fact had upon the court or jury by which it was heard. If that court or jury viewed the evidence as irrelevant and permitted it to have no influence, then certainly it ought not to be regarded as a destroying vice of a judgment of which it formed no part. But why was the evidence admitted in opposition to the objection of the complaining litigant? Are we to presume that the judge disregarded the duties of his office, and admitted testimony which he knew he had no business to hear? or shall we not rather conclude that he admitted it not from the mere love of gossip, but because he thought it proper to influence him in the performance of his official duties with respect to the litigation before him? And if it did influence him, his judgment ought not to stand.

Irrelevant evidence is not offered without an object. That object is to produce an effect favorable to the party offering it. That the judge rules in favor of the reception of the evidence is a judicial decision that he will and ought to give it some weight where the case is to be decided by him, and

that the jury ought to give it some weight where the determination rests with them. As a matter of fact, irrelevant evidence frequently poisons the minds of judges and jurors, and indirectly contributes to the determination of the real issues in the case. The injured party is without redress. He cannot be expected to come to trial prepared to controvert irrelevant testimony; and he can rarely procure a new trial, for the appellate court will assume that because of its manifest irrelevancy, the evidence could have done no harm. Because there is no other way of avoiding its influence, direct or indirect, we incline to the opinion that a party who successfully insists upon the reception of irrelevant testimony should do so at the hazard of losing his judgment, should he obtain one, whether the decision is by court or jury, unless it is clear from the whole case that no other result than the one reached was legally possible.

BLANDING v. SARGENT.

[33 NEW HAMPSHIRE, 239.]

JUDICIAL COGNIZANCE CANNOT BE TAKEN OF EXISTENCE, SITUATION, AND LIMITS OF PLACE, not being a public corporation, described by its name only.

CONTRACT IS NOT WITHIN STATUTE OF FRAUDS if by its terms, or by reasonable construction, it can be fully performed within a year, although it can only be done by the occurrence of some contingency, as death, by no means likely to happen.

CONTRACT IS NOT WITHIN STATUTE OF FRAUDS if the agreement on one side can be performed within a year, and is so performed, although the agreement on the other side is impossible to be performed within that time.

ASSUMPSIT. The declaration alleged that in consideration that the plaintiff would buy of the defendant the good-will of the business of a physician which the parties were conducting together at a place called Fisherville, lying in Concord and in Boscawen, and would pay the defendant therefor two hundred dollars in five years, the defendant agreed to give up to the plaintiff the business, and not to do any more business as a physician at said Fisherville; and the plaintiff, relying upon the defendant's promise, purchased of the defendant the good-will for the said sum, to be paid in five years; but the defendant had continued to do business at said Fisherville as a physician. A second count alleged the payment, instead of being in five years, to be on demand; while a third count alleged that it was to be made in five equal installments of forty dollars each. There was a demurrer to the declaration, on the grounds that the contract set forth was void for uncertainty, there being no such place as Fisherville known to the law, and no limits shown within which the defendant was not to practice. The declaration was also asserted to be uncertain upon similar grounds.

The parties agreed that the contract set up by the plaintiff was not in writing; and if the fact that the plaintiff gave his notes for the two hundred dollars should be considered material, the agreement was to be discharged, and the case to stand for trial.

W. H. Bartlett, for the defendant.

Bellows, for the plaintiff.

By Court, *BELL, J.* The court are in no situation to decide that Fisherville is not a good and sufficient description of a place in Concord and Boscawen, as alleged. Whether there is a place called by that name, where it is situate, what are its limits, if it has any, are matters of fact, to be determined by a jury upon such evidence as the parties may lay before them. It is in no sense a matter of law of which a court can take judicial cognizance. What is included in a name descriptive of a place, not being a public corporation, is always matter for a jury: *Claremont v. Carlton*, 2 N. H. 373 [9 Am. Dec. 88]; *Doe v. Burt*, 1 T. R. 701; *Comyn on Land. and Ten.* 75; and see *Peake Ev.* 12; 1 *Phill. Ev.* 272, 1 *Cowen & Hill's Notes*, 241. Upon the demurrer no exception can be taken on this ground.

It is admitted by the case that the contract relied on by the plaintiff is by parol, and not in writing. And the question then arises whether, under the statute of frauds, any action can be maintained upon it. The language of the revised statutes, *Comp. L.* 459, sec. 9, is much the same in this respect as the statute 29 *Car. II.*, c. 3, sec. 4, "to charge any person upon any agreement that is not to be performed within one year from the time of making it, unless the agreement, etc., shall be in writing," etc.

The authorities cited for the plaintiff have established elsewhere the rule that the statute does not apply to any contract, unless by its express terms, or by reasonable construction, it is not to be performed, that is, is incapable in any event of being performed, within one year from the time it is made.

If by its terms, or by reasonable construction, the contract can be fully performed within a year, although it can only be done by the occurrence of some contingency by no means likely to happen, such as the death of some party or person referred to in the contract, the statute has no application, and no writing is necessary.

Though either of the parties may have it in his power to put an end to a contract within a year, yet if, independent of the exercise of such a power, the agreement cannot be performed within a year, it must be in writing.

If the agreement can be fully performed by either of the parties within the year, and it is so performed, the agreement of the other party is not within the statute, though it may be impossible to perform it within a year.

These decisions are almost equivalent to a repeal of this clause of the statute; but as they met the approval of the courts generally, and may be regarded as the settled construction of the statute, they may properly be considered as adopted by our legislature when the statute was re-enacted.

When these principles are applied to the present case, it is found not to fall within the statute, because it is evident that if the defendant had died within a year from the making of the contract, having kept his agreement while he lived, his contract would have been fully performed.

If the plaintiff, instead of a verbal agreement to pay two hundred dollars in five years, as the consideration of the defendant's contract, as might naturally be understood from the declaration, had agreed to give at once his notes for two hundred dollars, payable in five years, and the notes were made accordingly, the whole contract might be valid without any other writing, on the ground that the agreement on one side was to be performed, and was performed, within a year.

It does not, however, seem to be material to show that to be the true state of facts, and it could not be done effectively without an amendment of the declaration.

Demurrer overruled.

PERLEY, C. J., and FOWLER, J., having been of counsel, did not sit.

JUDICIAL COGNIZANCE WILL BE TAKEN OF CIVIL DIVISIONS OF STATE INTO COUNTIES, ETC.: *State v. Glasgow*, 2 Am. Dec. 629.

CONTRACT CAPABLE OF BEING PERFORMED WITHIN YEAR IS NOT WITHIN STATUTE OF FRAUDS: *Moore v. Fbx*, 6 Am. Dec. 338; *Peters v. Westborough*, 31 Id. 142; *Linseott v. McIntire*, 33 Id. 602; *Gadsden v. Lance*, 37 Id. 548; *Lockwood v. Barnes*, 38 Id. 620; *Lapham v. Whipple*, 41 Id. 487; *Lyon v. King*, 45 Id. 219. The principal case is cited to this effect in *Esty v. Aldrich*, 46 N. H. 129; and in *Worthy v. Jones*, 11 Gray, 170, it is cited to the point that an agreement by two millers, upon selling their mill and store, not to engage in the same business at such place or in such way as to interfere with the business to be done by the purchasers, is liable to be terminated within a year by the death of the promisors, and is therefore not within the statute.

CONTRACT VOID IN PART UNDER STATUTE OF FRAUDS IS NOT NECESSARILY VOID IN TOTUM: *Rand v. Mather*, 59 Am. Dec. 131, and note. In *Rogers v. Brightman*, 10 Wis. 68, the principal case is referred to on the point that where an agreement on the one side was to be and was fully executed within a year, the contract was not within the statute of frauds.

STATE v. CLARKE.

[33 NEW HAMPSHIRE, 329.]

IT IS LOTTERY, WITHIN MEANING OF STATUTE imposing a fine for disposing of any estate, real or personal, by lottery, where a sale of books is made for more than their value, and the purchasers are entitled to gifts or prizes, to be ascertained by a correspondence, unknown to them, between certain numbers placed on the books, and the different articles proposed as gifts or prizes.

INDICTMENT charging William L. and Oliver H. Clarke with disposing of a ring by lottery to one Charles Flanders. The evidence showed that the defendants kept a store at Concord, and Flanders, seeing one of their handbills headed "gift-book sale," went to their store, and purchased of William L. Clarke, for one dollar, a book worth less than that amount. On the back of the book was written a number which William L. gave to Oliver H. Clarke, who opened a book and placed a piece of zinc with a hole in it on one of its pages, and then informed Flanders that he was entitled to a gold ring of the value of three dollars. This evidence was excepted to by the defendants as incompetent to show that the ring was disposed of by lottery; and it was also claimed that it did not show the defendants to be jointly guilty, or that William L. was guilty if Oliver H. was. The exceptions were overruled, and the jury instructed that if they found that the ring was disposed of by lot, or chance, there was a lot or chance used in determining whether Flanders was to have it or not; and that if the defendants acted together in disposing of the ring, they were both guilty, but if either did not participate, he might be declared not guilty, and the other guilty. The defendants were each found guilty, and they moved to set aside the verdict and for a new trial.

Rolfe and Marshall, for the defendants.

George and Foster, for the state.

By Court, PERLEY, C. J. The provision of the statute on which this indictment is founded is in these terms: "If any person shall make or put up any lottery, or shall dispose of any estate, real or personal, by lottery," he shall be fined not exceeding five hundred dollars nor less than fifty dollars: Comp. Stats. 561, secs. 1, 2.

The word "lottery" is not a term of the law, and to dispose of real or personal estate by lottery is not an offense which has a recognized and established legal definition. In construing the statute, we must be guided chiefly by the meaning of the term

as it is ordinarily used in a popular sense, and by reference to the mischief intended to be redressed.

There are, however, some cases in which courts of other jurisdictions have been called on to give a construction to recent laws enacted against lotteries. The annual distribution of paintings by lot among the members of the American Art Union has been held to be a lottery forbidden by the constitution of New York: *People v. Art Union*, 7 N. Y. 240; *Bennet v. Art Union*, 6 Sandf. 614.

In *Den ex dem. Wooden v. Shotwell*, 23 N. J. L. 465, it was held that if a tract of land is divided into lots of unequal value, and these are sold at a uniform price and distributed among the purchasers by lot, it is a lottery. In *People v. Art Union*, 13 Barb. 577, it was decided to be unlawful to hold forth to others that he has articles which will be distributed by lot or chance to any person who before the distribution shall have paid any money for the chance of obtaining such article.

The name given to the process and the form of the machinery used to accomplish the object are not material, provided the substance of the transaction is a distribution or disposition of property by lot. In the interpretation of remedial statutes like this, "the office of the judges is to make such a construction as will suppress the mischief and advance the remedy, and to suppress all evasions for the continuance of the mischief:" *Magdalen College Case*, 11 Co. 71, b.

From these authorities, and from the common signification of the term, we draw the conclusion that where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public what the party who pays the money is to have for it, or whether he is to have anything, it is a lottery within the meaning of the statute.

From the evidence reported in this case, the jury were well warranted in finding that according to some scheme upon which the defendants professed to act there was a correspondence between the numbers placed on the books purchased and the different articles proposed as gifts or prizes, by which when the book was purchased the defendants ascertained what gift or prize the purchaser was entitled to have according to their scheme. The defendants, on the evidence, appear to have held out that notion to the public, and the jury were at liberty to find that, so far at least, the business was fairly conducted.

The purchaser did not know when he bought his book and paid his money what prize or gift the number on it would entitle

him to receive, and it was with him as much a matter of lot and chance as if he had drawn the number from a hat.

He paid more than the book was worth, and the excess must be understood to have been paid for this chance. As to the real nature of the contrivance, it stands as if the excess had been paid for the chance without any sale of a book to color the transaction.

It is objected that, by the purchase of the book, with a number that in some way designated the gift to which the purchaser was entitled, his gift was ascertained at once upon the purchase, and did not depend on any subsequent drawing of lots; and that therefore the case does not fall within the meaning of the term "lottery," as it is ordinarily used, and is not within the statute. But with the purchaser, what prize he might obtain was a mere matter of lot and chance. The scheme involved substantially the same sort of gambling upon chances as in any other kind of lottery. It appealed to the same disposition for engaging in hazards and chances with the hope that luck and good fortune may give a great return for a small outlay, and, as we think, within the general meaning of the word "lottery," and clearly within the mischief against which the statute is aimed. The instructions of the court, on this part of the case, appear to have been quite correct.

The evidence was competent and abundantly sufficient to show the concurrence of both the defendants in the transaction. They occupied the shop together; the sale of this particular book was not a solitary act; they carried on together a trade in books on the same plan; this sale of the book and number, and the ascertaining of the gift to which the purchaser, according to their scheme, was entitled, were in the course of their ordinary trade and business. They both actually and actively concurred in the matter. One made the sale and took payment; the other received the number, went through the ceremony of applying the zinc, told Flanders what he was entitled to have by way of gift, and delivered him the ring.

The offense charged in the indictment is made a crime by the statute, and, like most other crimes, may be committed by one man separately, or by two or more jointly.

The conviction was right, and there must be judgment accordingly on the verdict.

STATUTES AGAINST LOTTERIES INCLUDES WHAT.—A statute declaring "all lotteries whatever, whether public or private, common and public nuisances," and prohibiting the same under penalty, includes in its purview a scheme

for the sale of a tract of land in lots of unequal value, to be distributed among the purchasers by chance, by means of tickets or numbers bought at a fixed price greatly exceeding that of a majority of the lots, although there are no blanks in such scheme: *Seidenbender v. Charles*, 8 Am. Dec. 682; and see the principal case cited in *Swain v. Russell*, 10 Ind. 440, on a similar state of facts to the foregoing, to the point that schemes for the division of property by chance are lotteries. The principal case is also referred to in *Whitney v. State*, Id. 405, on the point that many schemes to aid schools and churches and gift exhibitions are disguised lotteries, and may be prohibited by statute; and a statute having such operation is not the inhibition of a free sale of property, but of a mode of swindling in disposing of it.

TOWNS v. PRATT.

[33 NEW HAMPSHIRE, 345.]

OFFICER ATTACHING TRUNK IS NOT LIABLE FOR INTERMEDDLING WITH ITS CONTENTS, which are exempt from attachment, if he does it to no greater extent than merely to remove them from the trunk, and deliver them to the owner, or upon the owner's declining to receive them when offered, to keep them safely until called for. *Per Sawyer, J.*

TRUNK, CABINET-BOX, AND BREASTPIN ARE NOT EXEMPT FROM ATTACHMENT as household furniture and wearing apparel necessary for the debtor and his family, under the New Hampshire statute.

TROVER for a trunk and its contents. The trunk contained articles of wearing apparel and a mahogany cabinet-box containing a breastpin, a cigar-case, and a pack of playing-cards. From the agreed statement of facts, it appeared that the defendant Durgin, a deputy sheriff, attached the articles in question as the property of the plaintiff. The plaintiff was present at the time of attachment, and was requested by the officer to remove the wearing apparel from the trunk, but he declined to do so. The officer then opened the trunk, carefully removed the clothing, and offered it to the plaintiff, who declined to receive it. The clothing was retained by the officer in his possession until delivered by him to the plaintiff, who sent for it some time afterwards. The plaintiff was in the habit of keeping his clothing in the trunk. The trunk and the cabinet-box and its contents were sold under execution. Judgment was to be rendered for the plaintiff for such damages as might be agreed upon by the parties, or assessed by the court, if the court should be of the opinion that the defendants were liable for taking any of the articles; otherwise judgment was to be given for the defendants.

Bellows, for the plaintiff.

Alexander and Bartlett, for the defendants.

By Court, SAWYER, J. If the trunk in question was liable to attachment, the defendant Durgin was authorized to seize it, although in so doing he might to some extent interfere with the plaintiff's possession of articles contained in it which were exempted. In taking the trunk into his possession upon attaching it, he must necessarily take with it its contents; and if he intermeddled with such of them as were not liable to attachment to no greater extent than merely to remove them from the trunk and deliver them to the owner, or upon his declining to receive them when offered, then to keep them safely until called for, he committed no wrong to the plaintiff for which he can be made liable in any form of action.

The only question which arises upon the case is, whether the trunk itself, or either of the other articles taken and sold by the defendant Durgin, namely, the cabinet-box or breastpin, were exempted from attachment by virtue of the provisions of section 2, chapter 184, of the revised statutes, in which are enumerated the several classes of property exempted from attachment and execution, and among which are "the wearing apparel necessary for the debtor and his family," and "household furniture to the value of twenty dollars."

The cigar-case and playing-cards, it would seem to be conceded, do not come within the description of any of the kinds of exempted property.

Articles of jewelry, designed to be worn upon the person as ornaments, are not wearing apparel in the popular sense of the term. As understood in its ordinary signification, it means clothing; garments worn to protect the person from exposure, and not articles used for ornament merely. In its original signification, the word "apparel" may have a more extensive meaning, including not merely vesture—habiliments for covering the person—but all ornaments and decorations worn with the vesture.

The exemption, however, under the statute is limited to the wearing apparel necessary for the debtor and his family. The word "necessary," as here used, is not to be understood in its most rigid sense, implying something indispensable, but as equivalent to convenient and comfortable: *Peeverly v. Sayles*, 10 N. H. 356. It would therefore include such articles of dress or clothing as might properly be considered among the necessities in contradistinction to the luxuries of life: *Davlin v. Stone*, 4 Cush. 359. Whether an article attached is a necessary or a luxury may, under some circumstances, be a question for the

jury, depending upon the situation of the debtor and the character and uses, and perhaps the cost, of the article. But in reference to trinkets, like a breastpin, we think the court may be understood to know so much of their nature and purposes as to be at liberty to determine, without the intervention of a jury, that under no circumstances can they be held to be requisite for the comfort or convenience of the wearer as apparel, so as to render them necessary, within the meaning of the statute.

The trunk and cabinet-box, it is contended by the plaintiff, are household furniture. That either may be—and the former, at least, often is conveniently applied to household uses, and thus made to subserve the purposes of household furniture—is undoubtedly true; but such we do not understand it to be their primary or principal use. The expression “household furniture” must be understood to mean those vessels, utensils, or goods which, not becoming fixtures, are designed in their manufacture originally and chiefly for use in the family as instruments of the household and for conducting and managing household affairs. Neither of these articles would seem to hold such a place in the domestic economy. The trunk, though often perhaps made, to some extent, to take the place of the chest of drawers, the bureau, or the wardrobe, is, nevertheless, in its construction designed for and adapted to the use of the traveler as such, rather than the householder. By the cabinet-box we understand an article designed, in its material and workmanship, rather for ornament than use, and, so far as designed for use, intended for keeping jewelry and other small articles of value, thus ministering to the taste of the owner rather than the necessities or convenience of the household.

The object of the statute is not to secure to the debtor the enjoyment of property of that character at the expense of his creditors, but to prevent his being stripped of those articles of utility and convenience, under the limited value prescribed, requisite for the comfort of himself and family in maintaining a household in every condition of life.

The articles specified were all liable to attachment, and consequently the plaintiff, upon the facts stated, having no cause of action, there must be judgment for the defendant.

OFFICER'S LIABILITY FOR SEIZING OR ATTACHING EXEMPT PROPERTY: See *Dow v. Smith*, 29 Am. Dec. 202; *McGee v. Anderson*, 36 Id. 573; *State v. Morgan*, 38 Id. 714; *State v. Johnson*, 46 Id. 283. The principal case is cited in *Gay v. Southworth*, 113 Mass. 334, as assuming, rather than deciding, that in an action against an officer for attaching exempt goods it was for the plaintiff to show that they were such as were exempt from attachment.

"HOUSEHOLD FURNITURE," MEANING OF, IN STATUTE EXEMPTING FROM EXECUTION: See note to *Rockwell v. Hubbell's Adm'rs*, 45 Am. Dec. 255.

"NECESSARY WEARING APPAREL," WHAT INCLUDED IN, IN STATUTE EXEMPTING FROM EXECUTION: See *Richardson v. Buswell*, 43 Am. Dec. 450; note to *Rockwell v. Hubbell's Adm'rs*, 45 Id. 256.

"NECESSARY," MEANING OF, IN STATUTE EXEMPTING HOUSEHOLD FURNITURE FROM EXECUTION: See *Montague v. Richardson*, 63 Am. Dec. 173.

BADGER v. GILMORE.

[83 NEW HAMPSHIRE, 351.]

CONTRACT BETWEEN PAYEE AND INDORSEE OF NOTE DISCHARGED IN BANKRUPTCY IS ADMISSIBLE IN EVIDENCE in an action on the note by a subsequent indorsee against the maker, where the maker, after the discharge, promised to pay to the first indorsee an amount sufficient to reimburse him what he had paid for the note.

DEBTOR'S PROMISE TO PAY DEBT DISCHARGED IN BANKRUPTCY WAIVES DEFENSE OF DISCHARGE, and restores the debt to its condition of a valid legal obligation.

PROMISSORY NOTE MAY BE INDORSED AFTER DISCHARGE IN BANKRUPTCY, and is revived *pro tanto* by a promise to the indorsee to pay a part of the note, so as to give a subsequent indorsee a right of action thereon.

ASSUMPSIT on a promissory note made by a firm, of which the defendant was a member, to the order of Boynton & Swasey. The principal defense relied upon was a discharge in bankruptcy, to which the plaintiff replied a new promise. It appeared from the plaintiff's evidence that Boynton proved the note against the estate in bankruptcy of the defendant, and received a dividend thereon, and after the discharge sold the note to S. C. Badger for a less sum than appeared to be due upon it. The agreement between Boynton and Badger in regard to the sale of the note was admitted in evidence, against the objection of the defendant. Badger had desired the defendant to testify in a suit on the note against a supposed silent partner of the defendant's firm, but the defendant declared that rather than do so he would pay the note. He also declared that part of it had been paid, but that there was enough due on it to pay Badger. Badger, subsequently to these declarations, indorsed the note to the plaintiff. The counsel for the defendant claimed that the evidence did not sustain the declaration, and asked the court to rule that the action could not be maintained, but the court declined so to do. The court instructed the jury that if the defendant, after his discharge in bankruptcy, promised to pay the note, or any part of it, to S. C. Badger, such promise

renewed the note, and the plaintiff could maintain this action in his own name, and recover the whole or such part of the note as the defendant promised to pay. The plaintiff had a verdict, which the defendant moved to set aside, and that a new trial be granted.

Bellows, for the plaintiff.

Bartlett, for the defendant.

By Court, SAWYER, J. The defendant was discharged from liability upon the note declared on by the proceedings in bankruptcy. That liability, however, was one which could be revived by an express promise to pay the note, made subsequent to the discharge, and it may be revived in part by such express promise to pay a part of the debt. The note was transferred by the payees, Boynton & Swasey, to S. C. Badger, subsequently to the discharge in bankruptcy, and by S. C. Badger to the plaintiff, subsequently to the new promise relied on to revive it. Waiving for the present the consideration of the questions arising upon these facts, and assuming that a new promise to S. C. Badger, while he was the holder, would inure to the benefit of the plaintiff, the evidence introduced by the plaintiff of the declarations made by the defendant to S. C. Badger, that he would pay the note, was clearly competent to be submitted to a jury as evidence of such express promise. But considered in connection with the accompanying declarations, that a part of the note had been paid, and that there was enough due on it to pay the witness S. C. Badger, it might properly be considered by the jury under the circumstances as a promise to pay only so much as would be sufficient to reimburse to S. C. Badger the amount he had paid for it. In this view it was material for the plaintiff to show what the agreement was between S. C. Badger and Boynton at the time of the purchase of the note by Badger; and the evidence upon that point, introduced by the plaintiff and objected to by the defendant, was competent.

The question then arises whether, when the new promise was made to S. C. Badger, the note then in his hands, in virtue of the transfer from Boynton & Swasey, was capable of being revived by the new promise, so as to give to it a legal existence as a subsisting promissory note, with all its qualities as such, negotiability among the rest; or, assuming that S. C. Badger may be regarded at that time so far the holder of the note that there was a moral obligation on the defendant to pay it to him, which would constitute a good consideration for the new prom-

ise to S. C. Badger himself, whether, nevertheless, that new promise is of a character to be enforced by him alone, not having the quality of negotiability, so as to give a right of action upon the note to this plaintiff as the assignee of Badger.

If no right of action exists in the plaintiff, it must be because the effect of the proceedings in bankruptcy is not merely to bar a recovery against the defendant, but to extinguish the debt, in the same manner as it would be extinguished by payment, leaving nothing of its original vitality in the note to be the subject of transfer from Boynton & Swasey to S. C. Badger, and nothing to be transferred by him to the plaintiff; while on the other hand, if the operation of the bankrupt discharge is to create a bar to a recovery, by subjecting the debt to a disability which the debtor may remove at his pleasure, and by removing restore the debt to its original condition as a legal obligation, it must be because, notwithstanding the discharge, something of its original vitality—a *scintilla juris*—still attaches to the debt, which by the transfer in this case passed to S. C. Badger, and by the promise to him is raised to the condition of a legal liability, capable of being enforced by a suit.

In the case of debts barred by the statute of limitations, and taken out of the statute bar by a new promise, it is well settled that they are revived, with all their qualities and incidents, as though the bar had never existed.

Thus in *Little v. Blunt*, 9 Pick. 488, it was held that a new promise to the holder of a note, barred by the statute of limitations, inures to the benefit of a subsequent indorsee; and the same was held again in *Little v. Blunt*, 16 Id. 359.

In *Whitney v. Bigelow*, 4 Pick. 110, Parker, C. J., says an original promise must be made to the party or to some one authorized to receive it; but an acknowledgment, to take the case out of the statute of limitations, is an independent fact, which, even when made to a stranger, and in the absence of the plaintiff, defeats the operation of the statute.

In *Dean v. Hewit*, 5 Wend. 257, it was decided that an action may be maintained by the indorsee of a promissory note, when the statute of limitations has attached, on proof of a new promise to the payee; and the doctrine is reaffirmed in *Pinkerton v. Bailey*, 8 Id. 600; and in *Soulden v. Van Rensselaer*, 9 Id. 293. *Baxter v. Penniman*, 8 Mass. 133, was *assumpsit* on a note signed by the defendant, payable to the plaintiff's intestate, to which the statute of limitations was pleaded, and a replication of a new promise to the administrator. Parsons, C. J., says when

the parties are living, an admission of a promise or contract, undischarged within six years before action brought, takes it out of the statute of limitations. For the same reason, such an admission made by or to an executor or administrator is considered as having the same effect; and in accordance with this view, in *Emerson v. Thompson*, 16 Id. 429, it was decided that a new promise by an administrator within six years takes the case out of the statute of limitations, as well in an action against an administrator *de bonis non* as against the original administrator.

In our own courts the same doctrine has uniformly been held. In *Buswell v. Roby*, 3 N. H. 467, the new promise was to the administrator upon a note given to the intestate. Richardson, C. J., says: "We are aware that it has long been settled in England that when an administrator declares upon a promise to his intestate, the declaration cannot be supported by evidence of a promise to the administrator after his decease. But in this state and in Massachusetts it has always been held otherwise." *Hale v. Roberts*, cited in the case of *Buswell v. Roby*, *supra*, and decided in Strafford county, September term, 1820, was upon a note to the plaintiff, signed by the defendant's intestate, and admissions by the administrator were held to be competent to support the replication of a new promise to the intestate. So, too, an original absolute promise, barred by the statute of limitations, is revived by a conditional promise, upon proof of the fulfillment of the condition. And where such conditional promise is made after the decease of the creditor, and while there was no administrator upon his estate, it was held that the debt is revived upon proof of the happening of the condition, in a suit by a subsequently appointed administrator, and that in such case the declaration may proceed upon the original undertaking without averring the new conditional promise: *Belton v. Cutts*, 11 N. H. 170; *Atwood v. Coburn*, 4 Id. 316.

In *Ilisley v. Jewett*, 3 Met. 439, it was decided that the new promise removes the statute bar merely, but does not create a new and substantive cause of action, which can be the basis of the judgment, but that the judgment must be considered as rendered upon the old contract.

In England the course in all cases, except in actions by executors and administrators, is to declare upon the original cause of action: *Leaper v. Tatton*, 16 East, 420.

In the case of a negotiable promissory note, given by an infant, and ratified on coming of age by a promise to the payee, it may be negotiated afterwards by the payee, and a suit main-

tained upon it by the indorsee in his own name: *Reed v. Batchelder*, 1 Met. 559.

In all these cases the party proceeds in the suit, not upon the new promise, but upon the original security as the substantive cause of action.

The exemption from liability upon the original demand, which the limitation act, or the legal principle or rule for the protection of the minor, interposes, is considered as removed by the new promise, the benefit of the exemption being thereby waived by the party for whom the benefit was intended; and the debt becomes, by this consent of the debtor, a valid legal obligation, capable of being enforced by a suit upon it, precisely as if the exemption had never been interposed by the law.

And we think there is no sound distinction in this respect between these cases and that of a debt discharged by proceedings in bankruptcy, or under an insolvent law, and revived by a new promise. That for certain purposes and in some of their aspects there is a well-founded distinction between the two classes of cases is not to be questioned. Thus the statute bar under a limitation act may be held to affect the remedy only so as not to fall within the constitutional prohibition against enactments impairing the obligation of contracts; while a bankrupt law may be considered in this respect as going beyond the remedy and discharging the debt. So, too, when the debt is transferred to a foreign jurisdiction, the discharge granted in certain cases under the *lex loci* accompanies it, while the statute bar is limited to the boundaries of the domestic jurisdiction. So, too, a distinction obtains between the cases of demands barred by the statute of limitations on the one hand, and those discharged in bankruptcy or voidable on account of infancy on the other, in reference to the nature of the promise required to remove the exemption from liability; in the latter an express promise being necessary, while in the former an acknowledgment from which a promise may be inferred is sufficient. But whatever distinctions in other respects may exist among them, there is none of a substantial character in reference to the effect upon them of a promise sufficient in law to remove the disability under which they are placed, as debts incapable of being enforced until that disability is removed by the new promise. That effect is in all the cases to give them vitality as legal obligations, and to do it in precisely the same mode; namely, by removing the bar, discharge, or disability, by whatever term it may be designated, which the statute provision or legal rule has applied

for the time, and which will continue until removed by the new promise. They all stand alike upon the ground of debts which are not of legal obligation, but which may be made so by the act of the debtor in promising to pay them; amounting to a waiver of the benefit conferred by the law in respect to them; namely, exemption from legal liability for the debt.

To sustain this view, it is unnecessary to deny that the effect of the bankrupt certificate is to discharge the debt as a legal liability. It is only necessary to deny that it pays it. By payment the debt is dissolved and utterly extinguished. It can never be resuscitated as the same debt. Any arrangement by which such a result is apparently produced is the creation of a new debt. But there is no inconsistency in holding that the debt is discharged as a legal obligation by operation of the bankrupt certificate, and at the same time capable of being restored to its original validity upon being taken out of the operation of the discharge by a new promise. That the debt is not entirely extinguished by the discharge, conclusively appears from the fact that in all courts, even those in which the doctrine has been most studiously maintained that the bankrupt proceedings discharged the debt, the suit, nevertheless, in case of a new promise, proceeds upon the original demand; or if the new promise is so qualified and limited as to render it necessary to declare upon that, then it must proceed upon it as supported by the consideration which the original demand furnishes. The bankrupt or insolvent law may declare the debt discharged, and it is so in the sense that it is to be treated as discharged at the debtor's election, but not in the sense that the obligation is dissolved as by payment. That remains unbroken, though deprived of its validity as a legal obligation by operation of the discharge, until taken out of its operation by the new promise. And it is immaterial whether the view be taken that the legal liability is renewed because the debtor is again made directly liable for the original debt, or a new legal liability is incurred because he has promised to pay the old debt, and that is a sufficient consideration for such promise. In either case the plaintiff must prove the original indebtedness, and the liability at the time of suit brought; and if that liability arise from the new promise, it is just such a liability as the law implies from the old consideration, and hence the new promise accords with the old: *Whitcomb v. Whitney*, 1 Smith's Lead. Cas., 4th Am. ed., 621, note. The new promise may be qualified and limited, so as to fall short of the original liability; as, to pay in installments, or some other particular mode not

contemplated in the original contract; or it may be conditional, as, to pay, if ever able, or the like; but it cannot exceed the original promise, nor will the original liability constitute a consideration to do another or collateral thing: *Reeves v. Hearne*, 1 Mee. & W. 323. In *Earle v. Oliver*, 2 Exch. 89, Parke, B., says: "Promises to pay such debts simply [that is, debts barred by statute of limitations or discharged in bankruptcy], or to pay by installments, or when the party is able, are all equally supported by the past consideration of the original indebtedness; and when the debts have become payable *instantly*, may be given in evidence under the ordinary declaration in *indebitatus assumpsit*. But it does not follow, though a promise revives the debt in such cases, that any of the debts will be a sufficient consideration to support a promise to do a collateral thing, as to supply goods or perform work and labor. In such a case it is but an accord unexecuted, and no action will lie for not executing it."

In *Underwood v. Eastman*, cited for the plaintiff, which was decided in Grafton county, July term, 1847, the new promise was made by the defendant after his discharge in bankruptcy; the note being in the hands of the attorney of the payee for collection, and the new promise being made to him. The action was brought upon it for the benefit of the payee in the name of a nominal indorsee, and it was decided that the new promise took the debt out of the operation of the discharge; that thereby the debt was revived, and with it the note as the evidence of the debt, with all its former properties as a negotiable promissory note, and that the action might therefore be maintained in the name of the indorsee.

We have been furnished with the opinion of the court as delivered by Parker, C. J., in that case, and his reasoning fully sustains the views here presented. The reasoning of the same learned judge in *Betton v. Cutts*, 11 N. H. 179, points directly to the same conclusions.

The decisions in New York, Maine, and Vermont, which establish the contrary doctrine as the law of those states, proceed entirely upon the ground of the distinction between the cases of debts barred by the statute of limitations, and those discharged under bankrupt or insolvent laws. The leading case upon this point, and the one upon the authority of which the subsequent cases in New York and the decisions in Maine and Vermont mainly depend, is *Depuy v. Swart*, 3 Wend. 135; and in that case the ground of the decision as stated by the court is, that by operation of the discharge the note is *functus officio*, and the

debt extinguished as though paid, while the statute bar under a limitation act affects the remedy only. The soundness of the distinction in its application to the cases of debts barred or discharged and revived by a new promise has been questioned in the courts of New York by several of their ablest judges. Thus in *Soulden v. Van Ransselaer*, 9 Id. 293, Nelson, J., in delivering the opinion of the court, says that there is under the decisions of their courts a well-settled distinction between the bar by the statute of limitations and a bankrupt discharge; the former operating only on the remedy, and the latter impairing the contract; and at the same time he admits there may be great difficulty in maintaining the distinction in reference to the revival of debts under them by a new promise, upon any sound and consistent reasoning.

In *Shippey v. Henderson*, 14 Johns. 178 [7 Am. Dec. 458], in which the point decided was that where a debt was discharged and revived by a new promise the plaintiff might declare upon the original cause of action without noticing the subsequent promise, Thompson, J., says: "I see no reason why this case should differ from that of infancy, or that where the action is barred by the statute of limitations and revived by a new promise." And in *Sands v. Gelton*, 15 Id. 511, Spencer, J., says: "I never could see any difference, as regards the revival of a debt by a new promise, between one barred by the statute of limitations and one from which the debtor has been discharged under the bankrupt or insolvent laws. The remedy is equally gone in both cases. There is no substantial difference between them, and both rest on the same principle with a debt contracted by an infant not for necessaries."

And the distinction upon which the decisions in New York, followed by the cases in Maine and Vermont, are made to rest, doubted as it is by some of the ablest judges of the court which lead the way in establishing it, is practically repudiated in that court and all others, both American and English, by permitting the promisee to declare upon the original contract, as one revived and restored to its former condition by the new promise.

In Massachusetts the decisions upon the subject have maintained consistent ground. The early case of *Maxim v. Morse*, 8 Mass. 127, decided in 1811, was an action of debt on a judgment of the court of common pleas. Plea, discharged in bankruptcy, under the bankrupt act of congress of the fourth of April, 1800. Replication, that the defendant had waived and given up all advantage from that discharge, by a subsequent promise

to pay the judgment. Rejoinder, no such promise, and issue thereon. The verdict found that the defendant did promise, as set forth in the replication. The defendant moved in arrest of judgment that the action was misconceived; that it should have been *assumpsit* upon the new promise to pay the judgment, and not debt on the judgment. In support of the motion, it was urged that the debt was discharged and extinguished by the bankruptcy; that the replication was inconsistent with and a departure from the declaration, and that the finding was upon an immaterial issue, being an absurd and insufficient finding in an action of debt. But the court held that the issue was material; the pleadings very similar to those which frequently arise under the statute of limitations; that the defendant pleaded what was a legal bar to the plaintiff's demand. The plaintiff replied other matter, which showed the defendant bound in law to pay; and this being found for the plaintiff, there was no reason why judgment should not be rendered on the verdict.

In *Way v. Sperry*, 6 Cush. 238 [52 Am. Dec. 779], the question now under consideration was directly presented. That was *assumpsit* on notes payable to a third person, and by him indorsed to the plaintiff on the day of the commencement of the suit. The defense set up was a discharge in bankruptcy, and the answer of the plaintiff to this defense was a new promise subsequent to the discharge, but before the indorsement made to the payee. In delivering the opinion of the court, Metcalf, J., pronounces the grounds of decision in the cases cited from the New York, Maine, and Vermont reports as unsatisfactory and inconsistent, and says that the original debt is not destroyed by a discharge in bankruptcy, but is still so far an existing debt that it may constitute a sufficient consideration for the new promise, and may therefore be revived as a legal liability by a waiver of the defense which the discharge furnishes.

The promise of a debtor, then, to pay a debt, a legal recovery upon which is thus barred, whether it is by a statute of limitations or of bankruptcy, or by the legal maxim that an infant's contracts, not for necessities, are void at his election, though usually called a new promise, is rather to be considered in the light of a waiver of the defense which the law furnishes for the benefit of the party so held discharged. In pleading, it is sufficient to count on the original demand, and when the bar, discharge, or defense of infancy is interposed in the plea, then to reply the new promise, and the evidence offered under that replication is no variance

between the declaration and the proof; because, whether the defendant is held liable by reason of the original undertaking as an indebtedness revived, or by reason of his subsequent agreement, is immaterial, as the plaintiff must prove both the original undertaking and the existing liability. And if it is to be considered that the liability arises from the new promise, it is precisely the liability which the law implies from the original consideration.

It is true that the bankrupt act explicitly declares that no action shall be brought upon demands discharged; but if this is to be held to refer to all demands provable under the act, still the language used is no more explicit and direct than that of the statute of limitations, which declares that personal actions shall be brought within six years after the cause of action accrued, and not afterwards. In both cases the condition must be understood to be implied that the debtor has not waived the defense which the statute gives him.

The conclusions, then, to which we arrive are, that the promissory note declared on was not destroyed by the discharge, but still subsisted as a promissory note, capable of indorsement and transfer, though divested of its character of a legal obligation while under the operation of a discharge, and therefore, when indorsed to S. C. Badger, taken by him subject to that disability; that upon the promise made to S. C. Badger, and which, under the instructions given to the jury, has been found by them to have been a promise to pay part of the note, it was revived *pro tanto*, as a subsisting legal obligation, and with all its properties and qualities as a negotiable promissory note; that the indorsement to the plaintiff gave him the property in the note and a right of action thereon, as though the discharge had never become operative as to that part of the debt due upon the note to which the new promise related.

Upon these views no other questions arise in the case. Whether the new promise was made upon the consideration that the defendant should be relieved from testifying, or upon any other consideration, or whether it was made voluntarily without any other inducement or consideration than such as is to be found in the original indebtedness, are entirely immaterial. If the new promise is regarded merely as a waiver of the defense under the discharge, it is none the less or more a waiver because it was made upon this or that consideration, or without any consideration other than the indebtedness itself. The instructions given to the jury were correct, and were all that the case

required, and consequently there must be judgment on the verdict.

PERLEY, C. J., did not sit in this case.

DEBTOR'S PROMISE TO PAY DEBT DISCHARGED IN BANKRUPTCY WAIVES DEFENSE OF DISCHARGE: *Earnest v. Parks*, 27 Am. Dec. 280, and note; *Farmers v. Flint*, 44 Id. 351; *Way v. Sperry*, 52 Id. 779; *Haines v. Stauffer*, 53 Id. 493; *McWillie v. Kirkpatrick*, 64 Id. 125; *Hollister v. Abbott*, Id. 342; but a distinct unequivocal promise to pay the debt is necessary to revive it: *Merriam v. Bayley*, 48 Id. 591; *Yostheimer v. Keyser*, 51 Id. 555; and see *Stafford v. Bacon*, 37 Id. 366.

NEGOTIABILITY OF NOTE IS REVIVED BY NEW PROMISE AFTER DISCHARGE IN BANKRUPTCY, and the new promise inures to the benefit of a subsequent indorsee: *Way v. Sperry*, 52 Am. Dec. 779; and see *Depuy v. Swart*, 20 Id. 673.

ALCUTT v. LAKIN.

[33 NEW HAMPSHIRE, 507.]

RESERVATION IN DEED INCLUDES STANDING TREES, where it is of "all the hemlock, spruce, and birch timber in the wood-lot," especially when it does not appear that there was any manufactured lumber, and the reservation refers for measurement of the trees to the circumference at the stump.

ADMEASUREMENT OF TREES RESERVED INCLUDES BARK, where the reservation is limited to trees "measuring forty-two inches in circumference at the stump."

TRESPASS for cutting and carrying away timber. Plea of the general issue, with a justification of the act under a reservation in a deed. It appeared that the defendant had conveyed the premises to the plaintiff by a deed containing a reservation of "all the timber in the wood-lot on said land, measuring forty-two inches in circumference at the stump, said timber to be removed from off said land before the first day of April, 1855, meaning the hemlock, spruce, and birch timber." The jury were instructed that under this reservation the defendant had the right, within the time limited, to cut and carry away all the hemlock, spruce, and birch trees standing in the lot measuring forty-two inches and over in circumference, with the bark on, at the usual place of cutting them off. The plaintiff contended that the reservation did not include standing trees, and that the measurement should be made after the bark was removed or with the bark on, making proper allowance therefor.

Cutter, for the plaintiff.

Stevens and D. Clark, for the defendant.

By Court, FOWLER, J. Two questions only arise upon the exceptions to the rulings of the judge who presided at the trial below. The first is, whether the reservation in a deed of "all the hemlock, spruce, and birch timber in the wood-lot," on the premises conveyed, includes standing timber trees of those kinds; and the second, whether, if standing trees be thus included, the words of the deed limiting the reservation to trees "measuring forty-two inches in circumference at the stump" are to be construed as including or excluding the bark upon those trees at the point of admeasurement. There hardly seems to be any reasonable doubt of the correctness of the ruling on both points.

Timber is defined by Webster and other lexicographers as that sort of wood which is proper for buildings, or for tools, utensils, furniture, carriages, fences, ships, and the like. The word, says Webster, is applied to standing trees which are suitable for the uses above mentioned, as when we speak of a forest, it is said to contain excellent timber; or it is applied to beams, rafters, scantling, boards, planks, and other manufactured lumber, hewed or sawed from such trees. These are the two principal and legitimate applications of the word, and it is manifest that the first must have been intended by the reservation in the defendant's deed to the plaintiff, for there was no manufactured lumber on which it could operate, so far as appears from the facts reported in the case. Besides, the reference to the circumference at the stump would very clearly indicate that the parties at the time must have had reference to trees that were to be cut down, else they would not have imposed such a restriction. If only trees already felled were intended to be reserved, the reservation would have been unnecessary, or, if necessary at all, it could hardly have been deemed important to specify the size of the trees, inasmuch as those less than forty-two inches in circumference at the stump could have been of very little value to the purchaser of the land, while they might have been of some importance to the owner of the larger felled trees, to be removed at the same time and sold with them. But small standing trees would be valuable to the land-owner, to be preserved until they attained suitable dimensions for timber. They might grow upon the soil, and in a few years become valuable property, without risk or expense to him, and in that view only could the limitation be of importance.

The statutes and adjudged cases furnish numerous examples of the use of the word "timber" in the precise sense given to it

in the rulings of the court below. In *Pease v. Gibson*, 6 Me. 81, there was a contract for the sale of all the "pine-trees fit for mill-logs" on certain lands. In various parts of the same contract these trees are spoken of as "timber," "the timber," and "said timber," showing conclusively that the parties in that case understood "pine-trees fit for mill-logs" to be "timber," and nothing else.

In *Pulney v. Day*, 6 N. H. 430 [25 Am. Dec. 470], a sale of "all the pine timber on a certain part of a lot" was construed by the court, in accordance with what appears to have been the understanding of all the parties, to be a sale of all the pine-trees standing on that part of the lot suitable for timber. So in *Olmstead v. Niles*, 7 Id. 522, where the contract was a sale of "all the pine timber on lot No. 13," nobody seems to have doubted it was a sale of all the standing pine timber trees on the lot.

By section 6 of chapter 164 of the revised statutes, the judge of probate is authorized to license administrators to sell timber growing or standing on the real estate of the deceased.

Nor have we any hesitation in holding that the bark should be included in the admeasurement of forty-two inches at the stump, as specified in the contract. The bark is an integral and essential portion of the tree, indispensable to its life and growth. Besides, it would be extremely difficult, if not utterly impracticable, to ascertain the circumference of a tree without the bark, while standing. The idea that in a contract concerning timber trees between practical business men it was ever contemplated that their circumference was to be ascertained, while standing, without including the bark in the measurement, seems to us preposterous, as there is no practicable mode of ascertaining the exact thickness of the bark but by the actual admeasurement of a section of it. But the circumference of the standing tree, including the bark, can very readily be ascertained at the usual place of cutting it off at the stump; and we are all of the opinion that this mode of admeasurement must have been in the minds of the parties when making the contract under consideration.

As the rulings of the court upon the trial were correct, there must be judgment on the verdict for the defendant.

FLINT v. PATTEE.

[33 NEW HAMPSHIRE, 520.]

DONOR'S OWN PROMISSORY NOTE CANNOT BE SUBJECT OF VALID DONATIO CAUSA MORTIS.

APPEAL from the decision of a commissioner in refusing to allow the following note: "Antrim, December 13, 1853. For value received, I promise to pay to Nathaniel Flint, or his order, the sum of one thousand dollars, to be on demand and on interest, at my decease, and not before. Adams Flint." The note was given by Adams Flint, during his last sickness and in view of his approaching death, to his brother Nathaniel, as a token of love and affection. It was agreed that if the court should be of the opinion that the plaintiff and appellant was entitled to recover upon the note, judgment should be rendered for its amount and costs, but otherwise for the defendant for his costs.

Stevens and West, for the appellant.

Wilcox and Briggs, for the appellee.

By Court, BELL, J. This question rests on authority. In favor of the position that a party in his last sickness, and in expectation of his approaching death, may make a note without any consideration but his good-will to the payee, and deliver it to take effect after his decease, and that such a note will be valid as a *donatio causa mortis*, are the following cases: *Wright v. Wright*, 1 Cow. 598; *Jones v. Deyer*, 16 Ala. 221; *Coulant v. Schuyler*, 1 Paige, 817; *Bowers v. Hurd*, 10 Mass. 427; *Woodbridge v. Spooner*, 1 Ch. R. 661; *Seton v. Seton*, 2 Bro. C. C. 610; and it was held that a bond given under like circumstances was valid: *Wells v. Tucker*, 3 Binn. 866.

On the other side are the cases cited by the defendant's counsel: *Raymond v. Sellick*, 10 Conn. 480; *Holley v. Adams*, 16 Vt. 206 [42 Am. Dec. 508]; *Parish v. Stone*, 14 Pick. 198 [25 Am. Dec. 378]; *Craig v. Craig*, 8 Barb. Ch. 76; *Harris v. Clark*, 2 Barb. 94; S. C., 3 N. Y. 93 [51 Am. Dec. 852], are directly in point, and decisive of the present state of the law as held in the neighboring states. With them agree *Tate v. Hibbert*, 4 Bro. C. C. 286; *Tate v. Hibbert*, 2 Ves. jun. 111; and *Bouts v. Ellis*, 21 Eng. L. & Eq. 337, where it is held that the check of the donor is effectual as a *donatio causa mortis* only where the money is paid before his decease.

The case of *Copp v. Sawyer*, 6 N. H. 386, is an express decision of the superior court upon the point which has long been

regarded and acted upon as the settled law of the state. It cannot now be departed from.

There must therefore be judgment for the defendant.

DONOR'S OWN PROMISSORY NOTE CANNOT BE SUBJECT OF VALID DONATIO CAUSA MORTIS: Note to *Bradley v. Hunt*, 23 Am. Dec. 606; *Parish v. Stone*, 25 Id. 378, and note; *Hall v. Howard's Adm'rs*, 33 Id. 115; *Holley v. Adams*, 42 Id. 508; *Harris v. Clark*, 51 Id. 355; but the note of a third person, or of the donee himself, payable to the order of the donor or of another, is the subject of such a gift: Note to *Bradley v. Hunt*, 23 Id. 600; *Borneman v. Sidlinger*, 33 Id. 626; *Brown v. Brown*, 46 Id. 323.

BOWMAN v. MANTER.

[33 NEW HAMPSHIRE, 530.]

MORTGAGE IS DISCHARGED BY PAYMENT OF MORTGAGE NOTE BY DEBTOR OF MORTGAGOR, at the mortgagor's request.

MORTGAGE IS NOT REVIVED AFTER NOTE IS TAKEN UP AND PAID, as against an execution creditor of the mortgagor, by the mortgagor's redelivering the note the next day to the mortgagee, upon an understanding, for the first time, that the note and mortgage were to remain in the mortgagee's hands, as security against a liability incurred by the mortgagee for the mortgagor.

WRIT of entry. The agreed state of facts showed that the demanded premises, together with other lands, were mortgaged in June, 1844, by the owner, Stowell, to Manter, to secure the payment of a note for nine hundred dollars. A portion of the mortgaged land, other than that in dispute, was released in December, 1847, by Manter to Stowell, to enable the latter to convey it to one Huse. Huse refused to take a conveyance upon Stowell's warranty, whereupon Manter, at Stowell's request, gave Huse a bond guaranteeing the title, and Huse then accepted the deed, and paid Manter, at Stowell's request, the amount of Manter's mortgage. Manter gave Stowell the mortgage note, but the next morning Stowell proposed to Manter to indorse a part of the money paid on the note, take a receipt for the balance, and leave the note and mortgage with Manter to secure him against liability on his bond to Huse. The indorsement was accordingly made, the receipt given, and the note redelivered to Manter. In April, 1852, the demandant recovered judgment against Stowell, and levied an execution on the land.

Morrison, Fitch, and Stanley, for the plaintiff.

D. and D. J. Clark, for the defendant.

By Court, PERLEY, C. J. Manter gave his bond to Huse for Stowell without any security or bargain, or contract for security from Stowell. When the land was conveyed to Huse by Stowell, nine hundred dollars of the purchase money was paid by Stowell's request to Manter, the holder of the note and mortgage, who took the money and gave up the note to Stowell. The note was then paid and discharged by Stowell, who owed it. The money was his, being the price of his land sold to Huse, and in law was paid by him, being paid by his request. This discharged the mortgage without any release or other writing.

This is entirely different from the case where one having an interest in land advances money due on a mortgage to protect his own estate, and is allowed in equity, though the form of the transaction was a payment of the debt, to keep the mortgage on foot for security of the money advanced. The note was in this case paid by the maker and debtor to the payee and mortgagee, who had no remaining interest in the land. Until the new arrangement upon which the note was redelivered to Manter there was nothing from which any agreement, understanding, or intention could be inferred to uphold the mortgage after the note was paid. The defendant must rely on the new agreement and the redelivery of the note. But this could not have the effect to restore the note and mortgage, once paid and discharged, so that they should operate against third persons from the original date and delivery, in the same way as if they had never been paid.

If the old note once paid had been redelivered on a new consideration with the intention of making it the evidence of a new debt, it might perhaps have been valid between the parties for that purpose, as in the case of reissued bank notes. But this would not revive the extinguished mortgage. And so if the old mortgage had been redelivered with the old note, and the intention of the parties was that they should be a new security for a new debt then contracted, there are authorities which go to show that the redelivery of the old mortgage might, between the parties, give it the effect of a new deed: *Goodright v. Strahan*, Doug. 54, note; *Hudson v. Revett*, 5 Bing. 368. But in such case the new deed, if there was nothing more than a simple redelivery, would be without witnesses, without acknowledgment, and without registration, and could not affect third persons who had no notice. It would be in law a new deed and a new security, and must be treated as such.

In this case there was no redelivery of the old mortgage, nor any notice to the demandant.

On the case agreed, there must be judgment for the demandant.

PAYMENT OR RELEASE OF MORTGAGE DEBT DISCHARGES OR EXTINGUISHES MORTGAGE: *Ryan v. Dunlap*, 63 Am. Dec. 334, and note collecting prior cases; and it is extinguished as against third persons, who, even afterwards, acquire liens upon the property, notwithstanding any agreement between the parties designed to keep it alive to secure future advances: *Mead v. York*, 57 Id. 467. That a note and mortgage once paid and discharged cannot be revived without the consent of the parties is a point to which the principal case is cited in *Benson v. Tilton*, 58 N. H. 138. In *Graves v. Rogers*, 59 Id. 453, it was held that the assignee of a mortgage, having purchased the mortgaged premises and assumed payment of the mortgage debt, afterwards representing the mortgage as valid and subsisting, and transferring it as such to a purchaser in good faith, without notice of any defect, is estopped, as against such purchaser, from showing or insisting upon the fact of the payment of the mortgage debt, or claiming that the mortgage title has merged in fee; distinguishing the principal case as inapplicable, because there was no concealment of facts and no estoppel.

SIBLEY v. ALDRICH.

[88 NEW HAMPSHIRE, 568.]

INNKEEPER IS LIABLE FOR DAMAGE TO GUEST'S HORSE by the horse of another guest without any negligence on the part of the innkeeper.

CASE for damage done to a horse of the plaintiff while in the custody of the defendant as an innkeeper. The plaintiff's servant had stopped at the defendant's inn, and placed the horse in a stable connected with the inn. During the night the horse was kicked by the horse of another traveler, and his leg broken. The defendant offered to prove that the injury was not caused by any actual negligence of himself or his servants, but the court excluded the evidence. A verdict was taken for the plaintiff, by consent, to be set aside, or judgment rendered thereon, as the court should see fit.

Barton, and Metcalf and Wheeler, for the plaintiff.

Cushing, for the defendant.

By Court, **PERLEY, C. J.** The defendant offered to prove that the damage to the plaintiff's horse was not caused by any actual negligence of himself or his servants. He did not offer to prove that it happened through the negligence or default of the plaintiff, direct or implied; nor by irresistible force, inevitable accident, or by the act of God or the public enemy. The

question would seem to be whether, as a general rule, and in all cases, an innkeeper can discharge himself from liability for the loss of his guest's goods by showing that it did not happen by the actual neglect or default of himself or his servants.

On this point the authorities are not unanimous. Story, in his work on bailments, sec. 482, says: "By the common law, as laid down in *Calye's Case* [8 Co. 32], an innkeeper is not chargeable unless there is some default in him or in his servants, in the well and safe keeping and custody of his guest's goods and chattels within his common inn, but he is bound to keep them safe, without any stealing or purloining"—quoting thus far the language of the report in *Calye's Case*, *supra*, and then he adds: "This doctrine is, however, to be taken with the qualification that the loss will be deemed *prima facie* evidence of negligence." And in section 472, he says that this doctrine should be received with some hesitation, in view of the case of *Richmond v. Smith*, 8 Barn. & Cress. 9, where a different view of the law seems to have been entertained. Story's authority on a question of this nature is undoubtedly of great weight; but it is to be observed that he states his opinion with some hesitation, and he does not appear to have reached a conclusion in this instance, after his usual extensive and careful examination of the authorities.

In *Dawson v. Chamney*, 5 Ad. & El., N. S., 165, it was held that when goods have been deposited in a public inn, and there lost or injured, the presumption is that the loss or damage was caused by the negligence of the innkeeper or his servants; but that this presumption may be rebutted, and if the jury find in favor of the innkeeper as to negligence, he is entitled to succeed on a plea of not guilty. Lord Denman cited Story as authority for this rule. The circumstances of *Dawson v. Chamney*, *supra*, were much like those of the present case. The plaintiff gave his horse in charge to the defendant's hostler, who placed him in a stable with another horse, that kicked him and caused the injury complained of. *Metcalf v. Hess*, 14 Ill. 129, is to the same point, that an innkeeper may discharge himself by showing that the loss happened without any default on his part. The foregoing authorities go to sustain the position of the defendant.

In *Merritt v. Claghorn*, 23 Vt. 177, the court held that an action cannot be maintained against an innkeeper to recover for property lost by fire, which was occasioned by inevitable casualty, or superior force, and without any negligence on the part of the innkeeper or his servants. This last case is put on

peculiar grounds, and cannot be regarded as an authority for the general position that an innkeeper may discharge himself by showing that the loss did not happen by his default. The fire took in another building and spread to the inn.

So in *Kesten v. Hildebrand*, 9 B. Mon. 72, it was held that an innkeeper is *prima facie* liable, but not for a loss by external force or robbery, or if the loss occur by the neglect of the guest or his servants, or his companions: *Forward v. Pittard*, 1 T. R. 27, 31.

On the other hand, there are numerous authorities, direct and strong, to the point that the innkeeper cannot discharge himself by showing that loss did not happen by his default, but that he must go further, and show that it was caused by the default, direct or implied, of the owner.

Thus Chancellor Kent, 2 Com. 574, says: "An innkeeper, like a common carrier, is an insurer of the goods of his guest, and can only limit his liability by express agreement or notice. Rigorous as this law may seem, and hard as it may actually be in some instances, it is, as Sir William Jones observes, founded on the principles of public utility to which all private considerations ought to yield." Metcalf, in his note to *Bedelev. Morris*, Yelv. 162, places the liability of an innkeeper and common carrier on the same footing, and so does the civil law: Domat, B. 1, T. U., sec. 2, a, 1. *Burgess v. Kent*, 4 Mau. & Sel. 306, was much considered. The point there decided was, that an innkeeper is not answerable for the goods of his guest which are lost through the negligence of the guest out of a private room in the inn, chosen by the guest for the purpose of exhibiting the goods for sale, the use of which room was granted by the innkeeper, who, at the same time, told the guest that there was a key, and that he might lock the door, which he neglected to do. In commenting on *Calye's Case*, 8 Co. 32, and the language of the old writ, Lord Ellenborough is reported to have said: "There can be no doubt, also, that there may be circumstances, as if the guest by his own neglect induces the loss, or himself introduces the person who purloins the goods, which form an exception to the general liability, as not coming within the words *pro defectu hospitatoris*, and under such circumstances the plaintiff shall not complain of the loss." And Le Blanc, J., in the same case, says: "We must take the facts from the report, and also that the judge stated to the jury that the innkeeper was responsible to his guest for the safe custody of his goods, but that the guest might by his own misconduct discharge the innkeeper

from that responsibility." Here the general responsibility of the innkeeper for the safety of his guest's goods is clearly conceded. The decision is put on the ground of misconduct in the guest, which caused the loss, without any intimation that mere want of negligence in the innkeeper would discharge him. *Farnworth v. Packwood*, 1 Stark. 249, is to the same point with *Burgess v. Kent*, 4 Mau. & Sel. 306.

In *Richmond v. Smith*, 8 Barn. & Cress. 9, Lord Tenterden says: "It is clear that at common law, when a traveler brings goods to an inn, the landlord is responsible for them. In this respect I think the situation of the landlord was precisely analogous to that of a common carrier;" and Bailey, J., in the same case, says: "It appears to me that an innkeeper's liability very closely resembles that of a common carrier. He is *prima facie* liable for any loss not occasioned by the act of God or the king's enemies, although he may be exonerated when the guest chooses to have the goods under his own care."

In *Kent v. Shackford*, 2 Barn. & Ald. 803, Lord Tenterden is reported to have used the following language: "Innkeepers, like common carriers, are liable by the custom of the realm. The principle on which the liability of an innkeeper for the loss of the goods of his guest is founded is, both by the civil and common law, to compel the innkeeper to take care that no improper person be admitted into his house, and to prevent collusion between him and other persons. In the Digest, L. 4, T. 9, sec. 1, after stating the law that an innkeeper is liable for the goods of his guest, it is said, *Nisi hoc esset statutum materia daretur cum furibus adversus eos, quos recipiunt, cœundi.*"

Armistead v. White, 6 Eng. L. & Eq. 349, was an action against an innkeeper, and the judge charged the jury that if the owner of the goods was guilty of gross negligence, the innkeeper was discharged. The court held the instructions were sufficiently favorable to the plaintiff, and queried whether it was necessary that the negligence of the plaintiff should be gross, to discharge the defendant. It is not easy to understand why the cause should have been left to the jury in this way, if the doctrine of the prior case of *Dawson v. Chamney*, 5 Ad. & El., N. S., 165, had been recognized for law, and it is worthy of remark that no allusion is made to *Dawson v. Chamney*, *supra*, in the report of *Armistead v. White*, *supra*.

In *Mason v. Thompson*, 9 Pick. 280, it was decided that an innkeeper is liable for the loss of his guest's goods committed to his care, unless the loss is caused by the act of God or the

common enemy, or by the fault of the guest. And Wilde, J., in delivering the opinion of the court, says that this rule may undoubtedly in some cases subject the innkeeper to loss without any negligence or default on his part; that innkeepers as well as common carriers are regarded as insurers of property committed to their care, and are bound to make restitution for any loss or injury not caused by the act of God or the common enemy, or the neglect or fault of the owner. And it was decided in *Washburn v. Jones*, 14 Barb. 193, that an innkeeper is liable for all losses and damages happening, even without his default, excepting such as are caused by inevitable accident or the public enemy.

The question was very fully and ably discussed in the recent case of *Shaw v. Berry*, 31 Me. 478 [52 Am. Dec. 628], and the court there came to the conclusion that to discharge an innkeeper from liability for the loss of goods in his charge it is not sufficient for him to show that the loss did not happen by his neglect or default, but that he must go further and show that it happened by the fault, direct or indirect, of the owner.

The leading case on this subject is *Calye's Case*, 8 Co. 32 a, in which the point resolved was, that if a horse is put out to pasture at the request of the owner by an innkeeper, and is stolen, the innkeeper is not liable, because the horse, not being *infra hospitium*, is not in the charge and custody of the innkeeper as such, and his liability as an innkeeper does not attach. The report recites the words of the old writ, and states that by it all the cases concerning hostlers may be decided. The part of the writ which bore on the point resolved was that which limits the liability of the innkeeper, by the custom of the realm, to goods of the guest *infra hospitium*; and in commenting on the language of the writ, the reporter says that "the innkeeper shall not be charged unless there be a default in him or his servants in the well and safe keeping and custody of the guest's goods within his common inn; for the innkeeper is bound in law to keep them safe there, without any stealing or purloining, but he ought to keep his goods and chattels there in safety." Considering the connection of these remarks with the point resolved in the case, we think they could not have been intended to lay down any rule defining the extent of the innkeeper's liability for goods in his custody as such, but merely to state that his liability was confined to goods deposited in the inn.

The case then proceeds to state an exception to the rule that the goods within the common inn the innkeeper ought to keep

in safety, to wit, that if the goods are stolen by one whom the guest brings with him, the innkeeper is not liable, for then the fault is the guest's. There is no statement in the report that actual negligence is necessary to charge the innkeeper, or that he can discharge himself by showing that the goods were not lost by his actual negligence.

The language of the old writ has sometimes been made the ground of an inference that there must be actual negligence to charge an innkeeper. The writ recites, "that by the custom of the realm, innkeepers are bound to keep the goods of their guests within their common inn, without subtraction or loss, night and day, *ita quod pro defectu hujus modi hospitatorum sed servientium suorum*"—no damage shall in any manner befall such guest. The innkeeper is bound to keep the goods of his guest so that no damage happen by his default or that of his servants. The argument is, that the term *pro defectu* implies actual fault and negligence. But the innkeeper is sued for neglecting to perform his legal duty; and the question occurs, What is the duty which the law and the custom of the realm imposes on him? If the law holds him to keep the goods of his guest at all events, except in case where the loss happens by the act of God or the public enemy, or by the fault of the guest, then if the goods are lost by mere accident, or by robbery, without any want of actual care on his part, the innkeeper has still failed to perform his legal obligation, and the goods are lost by his neglect and failure to perform the duty which the law imposes. The law, in such case, charges the innkeeper with the duty of keeping the goods safely, and imputes to him the fault, if they are lost or damaged.

In this view of their meaning, these words of the writ are by no means idle and unmeaning, because the innkeeper is not in all cases liable for the loss of goods intrusted to his care. The loss may happen by the act of God, by the public enemy, or by the fault of the owner, and in that case the damage does not happen by the default of the innkeeper. If the declaration should merely allege that the goods were lost or damaged, without averring that the loss or damage happened by default of the innkeeper or his servants, it is apprehended that it would be substantially defective, and bad on demurrer, on the strictest rule which has been applied to the innkeeper's liability.

This argument, from the form of pleading, might be urged with equal force to show that a common carrier is only liable for loss that happens by his actual negligence. In the settled

form of declaring in case against a carrier, it is alleged that the defendant, "neglecting his duty in that behalf, did not safely and securely carry," etc., "but so negligently and improperly conducted himself that by and through the negligence, carelessness, and default of the defendant," the goods were lost or damaged: Angell on Carriers, 429, note; *Raphael v. Pickford*, 5 Man. & G. 551; 2 Ch. Pl. 271, 272.

And in the ancient form of declaring against a common carrier, the custom of the realm is alleged to be that *absque subtractione, amissione, seu spoliatione, portare tenentur, ita quod pro defectu dictorum communium postalorum, seu servientium suorum hujus modi bona et cal'alla, eis sic ut prefertur deliberata, non sunt perdit'ata, amissa, seu spoliata;*" and in assigning the breach it was alleged that "*pro defectu bonar' custodiæ ipsius defendantis et servientium suorum perdit'ata et amissa fuerunt.*"

Three different rules appear to be laid down on this subject in different authorities.

1. That the innkeeper is *prima facie* liable for the loss of goods in his charge; but may discharge himself by showing that the goods were lost by his negligence or default, and this is the ground taken by the defendant in the present case. This view of the law is sustained by *Dawson v. Chamney*, 5 Ad. & El., N. S., 165, and by *Metcalf v. Hess*, 14 Ill. 129.

2. That the innkeeper is discharged by showing how the accident happened and that it happened by inevitable accident or irresistible force, though the accident might not amount to what the law denominates the act of God, and the force might not be the power of a public enemy. This rule is countenanced by *Merritt v. Claghorn*, 23 Vt. 177, and *Kesten v. Hildebrand*, 9 B. Mon. 72.

3. That the innkeeper is liable, unless the loss was caused by the act of God or the public enemy, or by the fault, direct or implied, of the guest. This rule is maintained in *Burgess v. Kent*, 4 Mau. & Sel. 306; *Richmond v. Smith*, 8 Barn. & Cress. 9; *Farnworth v. Packwood*, 1 Stark. 249; *Kent v. Shackford*, 2 Barn. & Ald. 803; *Armistead v. White*, 6 Eng. L. & Eq. 349; *Mason v. Thompson*, 9 Pick. 280; *Shaw v. Berry*, 31 Me. 478 [52 Am. Dec. 628].

Of text-writers, Story, though with hesitation, goes for the first rule. Kent states the third rule strongly, and Metcalf adopts the same, and the civil law places the liability of the innkeeper and the common carrier on the same footing.

It is somewhat singular that on a practical question, which

must be as old as the rudiments of the law, there should be found at this day such diversity of opinion and decision. It is probably owing to the obscure way in which the subject is treated in the report of *Calye's Case*, 8 Co. 32, and the different interpretations which have been put on that case. On the whole, we think that the better rule is the strict one as laid down in the elaborate and very satisfactory case of *Shaw v. Berry*, *supra*. The weight of authority is heavily that way, and the policy and analogies of the law lead to the same conclusion.

Judgment on the verdict. —

INNKEEPER'S LIABILITY FOR GOODS OF GUEST: See *Mateer v. Brown*, 52 Am. Dec. 303, and prior cases in note; *Dickinson v. Winchester*, 50 Id. 760; *Manning v. Wells*, 51 Id. 688; *Shaw v. Berry*, 52 Id. 628; *Epps v. Hinds*, 61 Id. 628; *McDaniels v. Robinson*, 62 Id. 574; *Johuson v. Richardson*, 63 Id. 369.

BAILEY v. COLBY.

[34 NEW HAMPSHIRE, 29.]

BAILEE HAS NO ASSIGNABLE INTEREST WHERE BAILMENT MAY BE TERMINATED AT WILL of either party, or where a personal confidence is reposed in the bailee.

BAILEE MAY BY CONTRACT HAVE ASSIGNABLE INTEREST IN BAILMENT where there is no personal confidence reposed in him and the holding is for a term; but such assignment will transfer the bailee's interest only, and the assignee will hold the property in the same manner as did the vendor.

PLEDGER, PAWNER, OR OTHER BAILER HAVING LIEN ON PROPERTY BAILED MAY HAVE ASSIGNABLE INTEREST therein to the extent of his own debt, but not beyond such amount.

BAILMENT FOR HIRE FOR TERM IS ENDED BY ABSOLUTE SALE BY BAILER of the property bailed before the expiration of the term, though such sale pass no title, and the owner may maintain trover therefor if the vendee refuses to make delivery on demand; and the rule is the same though the bailee had a right to purchase the article within the term by paying the price thereof.

BAILER OF STEERS UNDER SALE TO HIM ON CONDITION that they were to remain the bailor's (vendor's) property until paid for by the former may, before payment, transfer them to another, subject to the bailor's claim, and the transferee will acquire the same rights as his transferrer had, and on tender of the price will become owner of the property.

TRESPASS *quare clausum* and for conversion of certain steers. The evidence shows that defendant Colby sold to one Young certain steers on condition that they were to remain his property till Young paid for them; that Young subsequently transferred

the steers to plaintiff Bailey, subject to Colby's claim for a balance due him; that Bailey tendered such balance due, but that Colby refused to take the same unless Bailey would pay all amounts due him by Young on other transactions, which Bailey refused to do. Defendant then went to plaintiff's close and peaceably took and drove away the steers. Verdict and judgment for plaintiff for full value of the steers, and interest.

Burke, for the plaintiff.

Tappan, for the defendants.

By Court, *BELL, J.* It was held in the case of *Sargent v. Gile*, 8 N. H. 325, that if a bailee for hire for a limited period sell the goods before the expiration of the term, the bailment is thereby ended, and the owner may maintain trover, if the vendee refuses to deliver them up on demand; and it will not alter the case if the bailee had by his contract a right to purchase the goods within the term by paying a certain price. The case was carefully considered, and the numerous authorities cited fully sustain the conclusions of the court. Unless, then, it shall appear that there are exceptions to this general rule to which the attention of the court was not called in that case, the rule then laid down must govern and conclude the case before us.

At common law, a feoffment or other conveyance, which operated to transfer the fee of the estate, if made by a tenant, created a forfeiture of the entire interest of the tenant, and the lessor could at once bring his action and recover the whole estate: 4 Kent's Com. 82, 106. But a conveyance by grant or other form of conveyance, the legal operation of which was merely to transfer to the purchaser the interest of the tenant, did not operate as a forfeiture, because it did not tend to divest or in any way injuriously affect the estate of the landlord: *Id.* 83; *Touchstone*, 105. To the rule last stated, however, there is an exception in the case of a tenant at will, for he has no assignable interest, and any conveyance of the property by such a tenant has the effect to put an end to the tenant's estate, while his grantee acquires no right whatever: 4 Kent's Com. 114; 2 Bla. Com. 146.

These distinctions in the case of real estate seem to us founded in the nature of things, and they are capable of application, and suitable to be applied in the case of personal property, where the circumstances are substantially similar, and no strong reasons of public policy or public convenience forbid their application.

In the great mass of bailments the reason which governs in

the case of estates at will would be found to apply. The nature of the bailment, the objects to be effected by it, forbid that the bailee should have, or should be regarded as having, any assignable interest. Wherever this should be found to be the case, any attempt by the bailee to assign any interest in the property bailed would be regarded as putting an end to the bailment on the part of the bailee, and the assignee would acquire no interest by the assignment, and would be liable to the action of the bailor, as a mere stranger would be. Such are all the cases where the bailment can properly be regarded as a personal trust in the bailee, and such in general are all those cases where the bailment is at will, that is, during the pleasure of both the parties.

But there is a large class of bailments where the bailment is accompanied with other contracts or stipulations, which affect its character, and give to the bailee other rights, not incident to a simple bailment, and where there is no personal confidence, and none of the characters of an estate at will, and where it would be entirely consistent with the analogies existing in the case of real estate to hold that the bailee has an assignable interest which may be transferred to a third person, and where such an assignment, upon the common principles governing the courts, would be enforced and protected as between the parties, and as against all persons whose interests are not injuriously affected by the transfer.

Of the cases which present themselves as falling within this class would be the case of a pledge, or pawn, where there is ordinarily nothing like personal confidence, and the contract is in no sense determinable at the pleasure of a party, but the bailee has an interest, or, as it might be said, a *quasi* estate, in the goods till they shall be redeemed. In the same class would fall all the various cases of lien, where the bailee has a right, as against the bailor, to insist upon the possession of the property until the lien is duly discharged by payment or the performance of other conditions. In all cases of this character, it might well be contended that a pledge is an incident of the debt, and passes with it upon its transfer: *Southerin v. Mendum*, 5 N. H. 420; *Whittemore v. Gibbs*, 24 Id. 484.

But the law seems to be well settled in the case of the pawn, that the pawnee may sell and assign all his interest in the pawn, or he may convey the same interest conditionally by way of pawn to another person, without in either case destroying or invalidating his security: *Mores v. Conham*, Owen, 123; *Rat-*

cliff v. Daveis, 1 Buls. 29; S. C., Yelv. 178; S. C., Cro. Jac. 244; Jackson, J., in *Jarvis v. Rogers*, 15 Mass. 408; Id. 389; *Man v. Shieſner*, 2 East, 523; *McCombie v. Davies*, 7 Id. 6, 7; *Goss v. Emerson*, 23 N. H. 42; Cross on Liens, 72.

But if the pledgee should undertake to pledge the property (not being negotiable securities) for a debt beyond his own, or to make a transfer thereof to his own creditor, as if he was absolute owner, it is clear that in such case he would be guilty of a breach of trust, and his creditor would acquire no title (beyond that held by the pawnee, says Story, Bailm. 215). It would admit of controversy whether the creditor could retain the pledge till the original debt was discharged, and whether the owner might not recover the pledge, as if the case was a naked tort without any right in the first pledgee.

In the case of liens, it is settled that a factor having a lien on goods consigned to him for sale, for advances or for a general balance, has no right to pledge the goods generally, and if he does, he conveys no right to the pledgee. But it is admitted that the factor has a right to assign or deliver over the goods as a pledge or security to the extent of his own lien thereon, if he avowedly confines his assignment or pledge to that, and does not exceed his interest: *Man v. Shieſner*, 2 East, 523-529; *McCombie v. Davies*, 7 Id. 6, 7; *Kuckein v. Wilson*, 4 Barn. & Adol. 443; 1 Bell's Com. 483; 2 Id. 95; *Urquhart v. McIver*, 4 Johns. 103; 2 Kent's Com. 626; Story on Bailm. 216; *Whitwell v. Wells*, 24 Pick. 31.

The case of letting to hire may fall in either of the two classes into which, for our present purpose, we have divided bailments. Such a letting may be at will, or it may partake of the character of a license, or personal confidence, in either of which cases the hirer will have no assignable interest. But it may also be a letting for a fixed time and without restriction or limitation from which any personal confidence may be inferred. It may be in terms to the party or his assigns, or the character of the use may be such as necessarily to imply that the property may be assigned. And in every such case the hirer may be deemed to have an assignable interest. Thus a party may lease his farm for years, with the stock and tools upon it. The whole lease, it can hardly be doubted, may be assigned. A party may let furnished lodgings for a term; the lessee has an assignable interest in the furniture. A sheriff who seizes such interest on execution is liable to the lessor neither in trover nor trespass: *Putnam v. Wyley*, 8 Johns. 432-435 [5 Am. Dec. 346]; *Ward v. McAuley*, 4 T. R. 489;

Gordon v. Harper, 7 Id. 9; *Edwards on Bailm.* 314. So a party who should lease his livery-stable with his stock of horses and carriages for a term of years could hardly complain if the lessee should assign his interest, unless some restriction was introduced in the lease. And the ship-owner who should let his vessel for a year could hardly object if the charterer should assign his interest to another pending the term.

Applying these principles in the present case, the result would be, that as the interest of Young was not a simple bailment terminable at the pleasure of the parties, and as it rested on no personal confidence, but was connected with a contract which gave him a right to keep the steers and use them till he paid for them, if he did that in a reasonable time, and to the absolute title to the property whenever such payment should be made, he had an assignable interest in the steers, a right to sell his interest; or, in other words, a right to sell the property subject to the claim of Colby, the defendant. If his sale was of his interest only, he had done no wrong, and his assignee, the plaintiff, was entitled to hold the property as he held it by his contract; and Colby had no right to resume the property from Bailey, more than he had from Young himself, until the reasonable time for payment had passed, and until after he had requested payment without success.

When Bailey, the plaintiff, went with Young to Colby, before any demand made for payment, and tendered him the balance due for the steers, the property became at once vested in Bailey, and Colby had no longer any right to interfere with it, and he was a trespasser, as any stranger would be, for taking it away. Colby had no right to ask payment of any other claim he had against Young; and Bailey, to perfect his title, was bound only to pay the amount Colby had agreed to take for the steers.

But if the sale by Young was a sale of an absolute title to the steers, in disregard of the claim of Colby, Colby might treat the contract with Young as violated and the bailment at an end, and resume the property at once, doing no unnecessary damage and using no violence, without liability for any damage for the taking, or for any entry on land of Young or Bailey to obtain the possession of it.

The cases on this subject are none of them inconsistent with our views, so far as we have discovered. The case of *Sanborn v. Coleman*, 6 N. H. 14 [23 Am. Dec. 703], was of the hiring of a mare for four weeks, and a sale absolute to the defendant a few days after. It was held that the sale was wrongful, and a

conversion which authorized the plaintiff to consider the contract at an end, and to claim possession of the mare wherever she could be found.

In *Sargent v. Gile*, 8 N. H. 325, the plaintiffs delivered furniture to one Wilson, upon a contract that he should keep it six months, and if in that time he paid for it, he was to have it; otherwise he was to pay an agreed price for the use of it. Wilson sold and delivered the furniture to the defendants, who knew nothing of the contract, but bought the property supposing it to be his, and the bailment was ended, and the bailor might recover the goods in trover. The case of *Lovejoy v. Jones*, 30 Id. 165, was of a similar character. In *Vincent v. Cornell*, 13 Pick. 294, oxen were sold, to be returned on a fixed day unless a certain sum was paid. The buyer sold the oxen, and the court held that the original buyer had a right to dispose of the possession with his right, such as it was, and the sale did not terminate the bailment. In *Loeschman v. Machin*, 2 Stark. 311, where the hirer of a piano sent it to an auction to be sold, it was held a conversion, and it is apparent the transfer could not have been limited to the hirer's interest merely. *Wilkinson v. King*, 2 Camp. 335, presents the same point; and *Samuel v. Morris*, 6 Car. & P. 620; *Emerson v. Fisk*, 6 Me. 200 [19 Am. Dec. 206], and *Galvin v. Bacon*, 11 Id. 28 [25 Am. Dec. 258].

The case of *Davis v. Emery*, 11 N. H. 30, tends to support our view of the law. It was there held that when a cow was taken, under a contract that she was to remain the plaintiff's property till paid for, and she was bailed by the buyer to another person to keep, no action could be maintained against such bailee till demand of the price and of the animal. And the case of *Nash v. Mosher*, 19 Wend. 431, fully sustains it; where it was held, generally, that a party having a lien upon goods may transfer the possession, subject to the lien, to a third person, who may lawfully hold the property until the lien is paid; but if the transferee sells the goods, the owner is remitted to his original rights, freed from the lien, and may bring trover against him.

Upon the facts reported in the case, which was evidently tried without any distinct reference to the distinction we make, it seems most probable that the sale was a rightful sale, made with the knowledge, on both sides, of Colby's interest, and subject to the performance of the contract with him. This was the view of the court upon the trial, and the verdict was taken by consent, upon an intimation of that opinion.

It was a question proper for the jury whether the sale was of Young's interest merely; but that does not seem to have been made a question. Unless it is supposed there is room for a controversy upon this fact, there must be judgment on the verdict.

BAILLEES HAVE NO POWER TO MAKE ABSOLUTE SALE OF PROPERTY BAILED, and such an attempt to sell is an assertion of title by the bailee in himself, and will terminate the bailment: *Emerson v. Fiske*, 19 Am. Dec. 206; *Samuel v. Morris*, 6 Car. & P. 620; *Crump v. Mitchell*, 34 Miss. 449; *Calhoun v. Thompson*, 56 Ala. 160; and the bailment will be ended though it was for hire and for a limited time which has not expired: *Sargent v. Gile*, 8 N. H. 324; *Lovejoy v. Jones*, 30 Id. 165; and the party in possession may be treated as a trespasser: *Leach v. Kimball*, 34 Id. 573, citing the principal case. In *McGregor v. Ball*, 4 La. Ann. 289, it has even been held that a depositary who sells the deposit commits a theft. A gratuitous bailee cannot sell the article bailed, if the bailor fails to take it away, but may place it on storage subject to be sold for storage charges: *Dale v. Brinckerhoff*, 7 Daly, 45. An unauthorized sale by a bailee confers no title even upon a *bona fide* purchaser: *Chism v. Woods*, 3 Am. Dec. 740; *Kitchell v. Vanadar*, 12 Id. 249; *Emerson v. Fiske*, 19 Id. 200; *Russell v. Favier*, 36 Id. 662; and trover will lie without demand, either against the bailee, his purchaser, or any one claiming under such sale: *Russell v. Favier*, *supra*; *Calhoun v. Thompson*, 56 Ala. 160; *Harpending v. Meyer*, 55 Cal. 559; *Stanley v. Gaylord*, 1 Cush. 536; *Riley v. Boston etc. Co.*, 11 Cush. 11; *Sargent v. Gile*, 8 N. H. 324; *Lovejoy v. Jones*, 30 Id. 165; so the bailor may maintain replevin against a *bona fide* purchaser from the bailee, and without demand or notice, the holding being tortious; *Emerson v. Fisk*, 19 Am. Dec. 206; *Galvin v. Bacon*, 25 Id. 258; *Smith v. Clark*, 34 Id. 213; *Sargent v. Gile*, 8 N. H. 324; but such a purchaser is never liable for a tortious taking, but only for the detention, and a declaration should be in the *detinet* only: *Smith v. Clark*, 34 Am. Dec. 213. Though the bailee cannot absolutely sell the bailment, he may at times assign and even sell absolutely his interest in the thing bailed, and such a sale will transfer all the bailee's rights, subject to the claim of the bailor. A bailee at will of personalty, where the bailment may be terminated at the pleasure of either party, and where a personal confidence is reposed in him, has no assignable interest: *McFarland v. Farmer*, 42 N. H. 391, citing the principal case. Where there is no personal confidence, where the bailment is for hire for a limited period, or where the bailee has a lien on the thing bailed, he may certainly assign to the extent of his interest. It is well settled that a pawnee may sell or assign all his interest in a pawn absolutely, or may even pawn the same with another, subject to the owner's rights: *Mores v. Conham*, Owen, 123; *Man v. Shiefner*, 2 East, 523; *McComb v. Davis*, 7 Id. 6; *Demainbry v. Metcalf*, 2 Vern. 690; *Ratchiffe v. Davis*, Yelv. 178; *Jarvis v. Rogers*, 15 Mass. 408; *Goss v. Emerson*, 23 N. H. 42; *Bush v. Lyon*, 9 Cow. 56; *Bullard v. Billings*, 2 Vt. 300. A pledgee cannot sell the pledged article absolutely before his debt is due, and if he does he is liable for conversion; but he may assign or transfer his interest, and his successor in interest will acquire such title as the pledgee had at the time of the transfer: *Dykens v. Allen*, 42 Am. Dec. 87, and note collecting other cases 93; *Stearns v. Marsh*, 47 Id. 248; *Whitlock v. Head*, 48 Id. 73, and note; *Luckette v. Townsend*, 49 Id. 786, and note; *Wilson v. Little*, 51 Id. 307, and note 314; *Hope v. Lawrence*, 1 Hun, 317; *Ogden v. Laikrop*, 1 Sweeney, 643. The business of factors being to sell, they are of

course governed by the law applicable to factors: See the extensive note to *Bigelow v. Walker*, 58 Am. Dec. 162. A bailee cannot pledge goods for his own debt or with intent to convert the proceeds to his own use, and in such case the pledgee acquires no title: *Gottlieb v. Hartman*, 3 Col. 53; *Bronson v. Heckler*, 22 Kan. 610; *Small v. Robinson*, 69 Me. 425.

LITTLETON v. RICHARDSON.

[34 NEW HAMPSHIRE, 179.]

RECORD OF VERDICT AND JUDGMENT IS ALWAYS ADMISSIBLE TO PROVE FACT THAT SUCH JUDGMENT WAS RENDERED or such verdict returned, in any case where the fact of such verdict or judgment, or the nature or amount of such judgment, becomes material; but for any other purpose it is not evidence against a stranger.

JUDGMENT FAIRLY OBTAINED AGAINST ONE IS AS CONCLUSIVE against another who is responsible over to the former, either by operation of law or by express contract, where he is duly notified of the pendency of the suit and requested to defend the same, as though he was the real party upon the record, and whether he appeared or not.

PERSON OBSTRUCTING HIGHWAY IS LIABLE TO TOWN THEREFOR, and will be bound by a judgment recovered by a traveler against the town for injury therefrom, where he is duly notified of the pendency of the suit.

IN ACTION TO CHARGE PERSON WITH DAMAGES RECOVERED BY TRAVELER against town, on account of injury suffered by him by reason of obstructions placed by defendant in a public highway, plaintiff, to sustain the same, must prove: 1. The contract or relation upon which the liability over depends; 2. An action for a cause for which the defendant is so liable under that contract or relation; 3. A notice to the defendant to take upon him the defense of the suit; 4. A recovery of damages, of which the record is conclusive evidence when the other points are established; and no presumption is allowed in favor of any of these points.

JUDGMENT AGAINST TOWN FOR DAMAGES FOR INJURY CAUSED BY OBSTRUCTIONS IN HIGHWAY may be evidence in another action to charge the person causing such obstruction with the amount of such judgment, of the facts on which judgment was obtained, where it appears on the face of the record that the recovery must have been for the same cause; otherwise the facts on which such judgment was rendered must be proved before the judgment can be admitted as evidence of anything beyond its own rendition and tenor.

CASE against defendant, who had placed obstructions in a highway, to recover the amount of a judgment against a town for injuries caused by such obstructions. The further facts necessary to an understanding of the case appear in the opinion.

Carpenter and Hibbard, for the defendant.

H. and G. A. Bingham, for the plaintiff.

By Court, BELL, J. The record of a verdict and judgment is always admissible to prove the fact that such judgment was rendered, or such verdict returned in any case where the fact of such verdict or judgment, or the nature or amount of such judgment, becomes material: *King v. Chase*, 15 N. H. 1 [41 Am. Dec. 675]; *Chamberlain v. Carlisle*, 26 Id. 553; *Warren v. Cochran*, 27 Id. 339. For any other purpose it is not evidence against a stranger: *Burrill v. West*, 2 Id. 190; *Thrasher v. Haines*, Id. 443; *Lawrence v. Haynes*, 5 Id. 33 [20 Am. Dec. 554]; *Chamberlain v. Carlisle*, *supra*; *Warren v. Cochran*, *supra*. But when a person is responsible over to another, either by operation of law or by express contract, 2 Phill. Ev., Cowen & Hill's Notes, 5, and he is duly notified of the pendency of the suit, and requested to take upon him the defense of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means and advantages of controverting the claim as if he was the real and nominal party upon the record. In every such case, if due notice is given to such person, the judgment, if obtained without fraud or collusion, *Coates v. Roberts*, 4 Rawle, 100, will be conclusive against him, whether he has appeared or not, *Jackson v. Marsh*, 5 Wend. 44; *Beers v. Pinney*, 12 Id. 309, of every fact established by it: *Lawrence v. Haynes*, *supra*, and cases there cited; *Warren v. Cochran*, *supra*; *Tarleton v. Tarleton*, 4 Mau. & Sel. 20; *Clark v. Cannington*, 7 Ala. 222; *Brewster v. Countryman*, 12 Wend. 446; *Walker v. Ferrin*, 4 Vt. 523; *Belden v. Seymour*, 8 Conn. 304 [21 Am. Dec. 661].

Among those who are thus answerable over are persons placing obstructions in highways. By the revised statutes, c. 59, sec. 5 (Comp. Stats. 151), "if any person shall place in any highway or street any timber, lumber, stones, or anything whatever, to the incumbrance or obstruction thereof, he shall be liable to the town for all damages and costs which said town shall be compelled to pay to any person who has sustained damage by reason of such incumbrance or obstruction."

The present action is brought upon this statute to charge the defendant with the damages recovered by Shute against the town on account of an injury suffered by him by reason of an obstruction placed by the defendant in a public highway.

In actions of this kind several points must be established by the plaintiff; as, 1. The contract or relation upon which the liability over depends; 2. An action for a cause for which the defendant is so liable under that contract or relation; 3. A notice

to the defendant to take upon him the defense of the suit; 4. A recovery of damages, of which the record is conclusive evidence when the other points are established. No presumption is allowed as to either of these points. Each is to be proved. Neither of these points is admitted here. It was admitted that the defendant placed in the highway the stones referred to in Shute's declaration against Littleton, and a notice to Richardson to defend the suit brought by Shute against the town was proved, and a recovery by Shute against the town for the causes set forth in his declaration, among which were the stones placed in the highway by the defendant.

The liability over of Richardson depended upon the points that the injury sustained by Shute was occasioned in part or entirely, *Palmer v. Andover*, 2 Cush. 600, by the stones placed by him in the highway, and that the recovery by him against the town was upon the same account. Of these points, the only evidence offered was the judgment itself. The admission as to placing the stones in the highway did not reach these points.

There might be cases where the judgment would be evidence of these points, because it would be apparent upon the face of the record that the recovery was had for the same cause alleged in the action against the party ultimately responsible. But it would rarely happen that some connecting evidence would not be required to show the identity of the cause of action upon which the recovery was had with that in which the recovery over is claimed.

If, however, the declaration in that case had so stated the cause of action that the court could clearly see that the cause there stated was identical with the cause stated in the present declaration, and that the recovery could have been for no other cause, the judgment would be competent and conclusive evidence of this point. But if the declarations leave that matter in any doubt, that deficiency must first be supplied by evidence *aliunde* before the judgment can be admitted as evidence of anything beyond its own rendition and tenor. We have therefore turned to the declarations to see how this matter is. The declaration of Shute states that there was a public highway, describing it, which Littleton was bound to repair and keep free from obstructions, etc. It then alleges that said "highway then was, and for a long time before had been, out of repair, defective, unsuitable, and insufficient, and said road was obstructed by a large stone placed in that part of the highway which was worked for public travel, and within the ditches, which stone was light colored,

and of such a dangerous kind and appearance that horses were frightened at it; and the road was out of repair in this, that there was no guard or railing to keep horses and carriages from being precipitated down a steep bank there, by the side of the traveled path of the highway near said stone, though there was a dangerous embankment, etc. And said road was unsuitable in this stone left to frighten horses, and in the embankment not railed as aforesaid near said stone." It then sets forth that the plaintiff's horse was frightened at the appearance of said stone, and ran back, and for want of railing the plaintiff was injured, etc.

The declaration in the present action sets forth the same road, and the obligation of Littleton to repair and keep it free from obstructions, and alleges that the defendant wrongfully placed a large quantity of large, newly split granite stones, of a light gray color, one of which stones was much larger than the others, in said highway, where it was worked for public travel, and between the ditches of said highways; which stones were of a dangerous appearance, and so placed in said highway that they obstructed the highway, and frightened horses and other animals passing along said highway; and one Shute, passing along said way with a horse and wagon, at or near said stones, his horse became frightened at the sight of said stones, and ran backwards several rods, got out of said highway, and upset the wagon among bushes outside the way, and broke the leg of said Shute, etc., and Shute brought his action against the town for the injuries so received, and recovered ninety-four dollars damages, and one hundred and thirty-four dollars and fifty-five cents costs, etc.

Now, it is apparent that these two suits may be for the same cause of action. A party may rightfully state, as Shute appears to have done, as many facts, as constituting part of his cause of action, as he supposes may in any event be useful to him. And upon the trial he may prove as many of them as he is able; and he may well recover if he proves one good cause, though he fail as to the others. Shute may have recovered upon the precise ground stated in the declaration against Richardson—the obstruction and danger caused by the stone placed by him in the highway. Shute may have failed to prove that the road was out of repair, or defective, or insufficient, or that there was an embankment requiring a railing, or that the railing was deficient. But, on the other hand, he may have entirely failed to prove that there was any stone in the road, or that the stone, if there

was one, contributed in any degree to the damage sustained; and he may have recovered on the ground of other defects of the road, or of the want of a railing, or of both.

The allegation of the plaintiff's writ against Richardson, that Shute sustained damages by reason of the stone placed in the road by Richardson, and that he recovered damages against the town for that cause, was one requiring proof; and it is very evident that the record of Shute's judgment does not prove a recovery for that cause, since it contains nothing to show that the recovery might not have been had for other causes set forth in Shute's writ, entirely unconnected with and independent of the stones placed on the road by Richardson. Though the declaration in the former suit may be broad enough to include the subject-matter of the second action, yet if, upon the whole record, it remains doubtful whether the same subject-matter was actually passed upon, parol evidence may be received to show the truth. And it is competent for the defendant to show that the question involved in the second action was not passed upon in the first: 1 Greenl. Ev., sec. 532, and cases there cited. If, from the general nature of the pleadings, the matter which has been tried does not appear upon the face of the record, it may be shown by other evidence: *King v. Chase*, 15 N. H. 14 [41 Am. Dec. 675]; *Briggs v. Wells*, 12 Barb. 567; *Birckhead v. Brown*, 5 Sandf. 134.

From these views, it follows that to render the record in Shute's case evidence generally in this action, it should have been shown that the recovery in that case was upon the same ground which is alleged as the cause of action in this case, and consequently, that the ruling of the court below, that the record alone was conclusive evidence of all the facts required to support the action, after it had been shown that the defendant placed the stones in the highway, cannot be sustained; and for the same reason, the ruling was incorrect that no evidence should be received to show that the judgment was not in fact recovered in any part on account of the stones.

As it was enough for Shute in his action to show that he sustained the damage he suffered by reason of all or any combination of the causes set forth in his declaration, it might not have been necessary for the parties to try, or for the jury to decide, whether the stone left by the plaintiff in the road specially contributed to the injury. The whole state of facts existing in the case might have been so laid before the jury that it cannot be ascertained whether or not the stone was regarded as material

to the plaintiff's right of recovery. If that cannot be shown, the record is not evidence of anything but the fact of its recovery and the amount, and it must then be for the jury to determine in the present case whether the damage to Shute was caused by the fault of the defendant in leaving this obstruction in the public highway. If the evidence laid before the jury tends to show that the recovery in Shute's case rested wholly upon the facts upon which the right of recovery in this case depends, the jury should have been instructed that if they were satisfied of that fact the judgment was conclusive evidence of all the facts necessary to entitle the plaintiff to recover, except the act of leaving the stones there.

But as the court cannot determine beforehand how the fact was in that particular, nor how that question may be decided by the jury; and as the jury may believe that the question was not a material matter upon that trial, it is not seen upon what principle the evidence offered by the defendant, that the stones were such as Richardson might rightfully place where he did place them, that the accident was wholly produced by causes independent of the stones, and that the stones contributed in no part to the accident, could be rejected; and we are of opinion it ought to have been received.

It was objected that the notice of the pendency of the action by Shute against Littleton was not sufficient, but we do not regard the objection as well founded. The notice states the pendency of the action of Shute against the town; that it was for damages sustained by Shute by reason of a stone placed in the highway by Richardson, to whom the notice was addressed; that the town will hold him responsible for the damages recovered, and request him to appear at the court and defend the action, and save the town harmless. This seems the proper information to be given and request to be made to a party supposed to be responsible in such a case.

The objection seems to be that the action referred to in the notice sets forth a very different ground of action from that stated in this case. But as has been said, the declaration in that case was suitable and sufficient to entitle the plaintiff to recover for the cause alleged in this case, and we do not perceive that the additional allegations could in any way prejudice the defendant's defense of that action.

It is objected that the record of Shute's judgment could not be evidence that the *locus in quo* was a public highway, but we have a different impression. This is a matter indispen-

sable to be proved to entitle Shute to recover, and evidence disproving that fact, if such existed, must necessarily constitute a part of the defendant's defense if he had assumed to defend that action.

There is in the case a motion in arrest of judgment for several causes. The two first, that the action should be debt and not case, and that the action is not stated to be founded on a statute, are not insisted upon in argument, and do not seem well founded. Debt does not lie for a mere tort; and it is not necessary to refer to a statute in a civil case, though the action may be founded upon it. It is enough that the cause of action be so stated as to bring it within the requirements of the statute. The courts take notice of public statutes, as they do of the common law.

It is further moved in arrest that it is not alleged in the declaration that there was a public highway at the place in question at the time of the accident. It is alleged it was a public highway on a day in September, but it is not alleged to have remained so afterwards. The exception seems unfounded, because, after alleging there was a highway there September 1st, the declaration states that on the thirteenth of October after, Shute was passing over and along said highway, etc., which is a substantial allegation that the same highway remained at the date of the accident. But this fact must necessarily have been proved upon the trial, or the town could not have obtained a verdict, nor could Shute have recovered his judgment but upon proof of that fact. Any supposed defect resulting from the want of the usual allegation that there was a highway there on the first of September, and ever since, is cured by the verdict.

As the rulings of the court are regarded as incorrect, the verdict must be set aside and a new trial granted.

THE PRINCIPAL CASE IS CITED in *Second National Bank v. Ocean National Bank*, 11 Blatchf. 372, to the point that if a person is responsible over to another, whether by positive law or express contract, and the latter is cited in to contest a suit, the judgment, if obtained in good faith, will be conclusive against him.

HILLIARD v. GOOLD.

[34 NEW HAMPSHIRE, 290.]

ESTABLISHMENT AND POSTING BY PRESIDENT OF CORPORATION OF TARIFFS OF FREIGHTS AND FARES ON RAILROAD, and receipt and appropriation by corporation of fares taken on such tariffs, without objection, raises the legal presumption that the president acted by authority of the corporation in thus fixing and posting such tariffs.

UNIFORM DISCRIMINATION IN ESTABLISHED RAILROAD TARIFF of five cents in favor of those passengers who purchase tickets before entering the cars over those who pay after taking seats in the cars is reasonable and just; and a passenger who has neglected to purchase a ticket, and who refuses on the train to pay such additional five cents, may lawfully be ejected from the cars, under a statute authorizing the expulsion of any person refusing to pay the established fare.

STATUTE REQUIRING CONDUCTORS ON RAILROADS TO EJECT PASSENGERS FROM TRAIN ON REFUSAL TO PAY established fare is applicable to all persons properly acting as conductors, without regard to the formality of their appointment or the source of their compensation.

IT IS QUESTION FOR JURY WHETHER PERSON HAS ACTED IN EXCESS OF HIS AUTHORITY, in cases where the justification of the act which is alleged to be wrongful and injurious is based on the exercise of authority, whether that authority be incident to the official character and duty of the party exercising it, or arise from the misconduct of the opposite party and the necessities of the case.

IT IS QUESTION FOR JURY WHETHER CONDUCTOR, IN EJECTING PERSON FROM RAILROAD TRAIN, acted within or in excess of his authority.

TRESPASS for an assault and injury of plaintiff by defendant while ejecting the former from a railroad train of which defendant was conductor. The facts necessary to an understanding of the case appear in the opinion.

Burns and Fletcher, for the defendant.

Benton, and Flint and Bryant, for the plaintiff.

By Court, FOWLER, J. The first question raised relates to the admission of the evidence as to the establishment and advertising of the rates of fare on the Atlantic & St. Lawrence Railroad. It appeared that they were established and advertised by order of the president of the corporation, but no direct evidence was offered that this was done by the authority of the directors.

By the provisions of the statute, "every railroad corporation in this state shall establish from time to time, and cause to be posted up in their depots, the rates or tariff of tolls between the several stations of such road, and between such stations and the stations of other roads with which they have a business connection, for the conveyance of freight and passengers," etc.: Comp. Stats. 354, sec. 62.

This power may be delegated by the corporation to suitable officers, or they may employ proper persons to promulgate and make known their action in the premises. Indeed, it is the only mode in which a corporation can exercise their powers: *Commonwealth v. Power*, 7 Met. 596 [41 Am. Dec. 465].

The same presumptions are applicable to corporations as are continually made in relation to private persons. Persons acting publicly as officers of the corporation are to be presumed rightly in office; acts done by the corporation which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter. Grants and proceedings beneficial to the corporation are presumed to be accepted, and slight acts on their part which can be reasonably accounted for only upon the supposition of such acceptance are admitted as presumptions of the fact. If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed: *Bank of United States v. Dandridge*, 12 Wheat. 64.

In this case, the open and public establishment and advertising of the tariff of fare and freight by the president of the road presupposed a delegated authority from the corporation, and the acts of the corporation in receiving and appropriating the tolls thus established recognized the existence of such authority in him, and therefore his acts are to be deemed rightful, and to have been performed in the exercise of the proper authority delegated to him by the corporation. Moreover his proceedings in establishing and posting the tariffs were beneficial to the corporation, and may therefore well be presumed to have been accepted and adopted by them; for their reception and appropriation of the tolls so established, without objection, can only be reasonably accounted for upon the supposition of such acceptance: *Angell & Ames on Corp.* 177, 178, and authorities.

We are unable to perceive how the character of the use of the Atlantic & St. Lawrence Railroad by the Grand Trunk Railway can affect the rights or liabilities of the defendant. The case finds that the plaintiff took a seat in the cars of the Atlantic & St. Lawrence Railroad, and that the defendant was a conductor of that road in charge of the train upon which the plaintiff took passage. Now, it seems to us wholly immaterial to the merits of the controversy between these parties whether that road was operated by the corporation to which it originally belonged, at their own expense, or by some other corporation, or even by some private individual. The statute makes it the duty of the conductor on each railroad to collect the tickets, or require the fare to be paid as established, and in case of neglect

or refusal to pay, authorizes him to employ the necessary force to remove the delinquent passenger from the train, and subjects him to a fine of from one to ten dollars for any omission of his duty in this behalf: Comp. Stats. 354.

We apprehend the provisions of this statute were intended to apply to every person properly acting in the capacity of conductor upon any railroad, without regard to the manner of his appointment, or the source from whence his compensation might be derived. They were designed to protect the stockholders, and through them the public, from the injurious practice of free riding, and to accomplish this purpose must be obligatory on every person rightfully in charge of any passenger train.

It would hardly be contended that a conductor upon a road operated by the mortgage bondholders, of which there are now several in this state, could excuse himself for violating any of the provisions of the statute because he was in the employment, and the road on which he was employed was operated at the expense and for the benefit, of the trustees of those bondholders. Such an excuse would evidently be a clear evasion of the letter as well as the spirit of the law, and if not thus excused, then such conductor would be justified, and not only that, imperatively required, to expel from the cars any person refusing to pay the established fare when requested.

The uniform discrimination in the established tariff of five cents in favor of those passengers who purchase tickets over those who pay after taking seats in the cars, besides the convenience with which it is attended, is so clearly just and reasonable, and so manifestly for the interest of the railroads in bringing into operation the only check they can have upon the honesty and fidelity of their conductors, that we think its legality is not to be doubted. It has been directly sustained by repeated decisions in other states, and we see no reason to question its propriety. Any passenger who, having neglected or refused to purchase a ticket, shall refuse to pay the additional fare thus established, may rightfully be expelled from the cars in a proper manner.

But the principal question in this case arises upon the ruling of the judge before whom it was tried, that the defendant was not justified in putting the plaintiff out of the cars at the time and place and in the manner disclosed by the evidence, and that consequently the plaintiff was entitled to a verdict as a matter of law, without submitting to the jury the question of the propriety or impropriety of the defendant's conduct in

ejecting him from the cars under all the circumstances of the case.

The defendant's brief statement sets forth that he was conductor upon the railroad, that the plaintiff was a passenger and refused to pay the lawful and established fare, wherefore he gently, and without unnecessary force, removed the plaintiff from the car at a suitable time and place, and under proper and suitable circumstances. If the defendant had filed a special plea instead of this brief statement, it must have resulted in an issue to the jury upon the question whether unnecessary force was used by the defendant in removing the plaintiff from the cars, at a suitable time and place, and under proper and suitable circumstances; in other words, whether the defendant had exceeded the authority vested in him and the duty imposed upon him by the statute. The rights of the parties and the course of the trial were not affected by the form of the pleadings. There is no doubt the brief statement set forth a sufficient justification; if not, that question should have been raised by a motion to reject it. As no such motion was made, the only question upon the pleadings was simply whether the defendant had proved his justification as he had alleged it, or whether in ejecting the plaintiff he had exceeded the authority with which he was clothed; and that surely it was for the jury, and not the court, to pass upon. It was a pure question of fact, such as it is peculiarly the province of a jury to decide.

To balance evidence, weigh probabilities, determine the credibility of witnesses, and draw inferences and conclusions from circumstances proved, belong to the jury. The province of the court is limited to the determination of the competency or incompetency of the evidence from which the jury may or may not make the requisite inferences of fact: *Pray v. Burbank*, 11 N. H. 290.

If the court assume the truth of facts, or, what is the same thing, that a certain result is established by them, without submitting them to the jury, and peremptorily instruct the jury that upon those facts the plaintiff is entitled to recover, it is error: *Duvall v. Farmers' Bank*, 7 Gill & J. 44; *Ragan v. Gailher*, 11 Id. 472. In the present case, the court seem not only to have assumed that the facts proved were true, but that that they established a certain conclusion, to wit, that the defendant had exceeded the authority vested in him, under the circumstances disclosed. This seems to have been clearly wrong.

In trespass for assault and battery, violence can be justified where the safety of the defendant's person was endangered by the plaintiff's own assault. But every assault will not justify a battery, and it is matter of evidence whether the assault was proportionate to the battery: 1 Stephens' Nisi Prius, 216; *Cockcroft v. Smith*, 2 Salk. 642; *Dance v. Lucey*, Sid. 246. If the plaintiff's own assault be pleaded, and the evidence will establish that the defendant's battery was excessive, the plaintiff may, under *de injuria*, and without a special replication or new assignment, give in evidence the excess: 1 Ch. Pl. 627; *Curtis v. Carson*, 2 N. H. 539. So also where the plea is moderate *castigavit*: *Hannen v. Edes*, 15 Mass. 347; or *molliter manus imposuit*: *Bennett v. Appleton*, 25 Wend. 371. Under the plea of moderate chastisement, the defendant must produce evidence of misbehavior on the part of the plaintiff sufficient to justify the correction given, and show by evidence that the correction was reasonable and moderate: 2 Greenl. Ev., sec. 97; 1 Saund. Pl. & Ev. 107, and authorities. So under the plea of *molliter manus imposuit*, it must appear by evidence that no more force was employed than the exigency reasonably demanded: 2 Greenl. Ev., sec. 98.

In all these cases the question is for the jury to determine. In *Imason v. Cope*, 5 Car. & P. 193, which was trespass for an assault and battery by the defendant, who was one of the marshals of London, and undertook to justify on the ground that it was his duty to keep clear the passage which the plaintiff at the time of the assault was obstructing, Tindal, C. J., in summing up to the jury, remarked: "If the defendant was at the time acting in the performance of his duty, undoubtedly any act he did, in the fair execution of that duty, might have been justified by him on the present occasion. The question you have to consider is, whether the course he took with respect to this plaintiff was not an excess of the duty he had to perform, and of the authority he then bore with him. Because if it was, you are then bound to give the plaintiff a fair compensation in damages for any injury occasioned in that manner. Undoubtedly the defendant would be justified in using a moderate degree of pressure to remove a person opposing those for whom he was bound, in the discharge of his duty, to make a passage. Or if any resistance occurred, then a more violent degree of pressure might be used. But it does not appear that any resistance was offered, beyond what the necessity of the case rendered absolutely necessary. Therefore you have to say whether a blow

which appears to have been struck instantly, without any attempt to remove the plaintiff by other means, was or was not an excess of the authority which the defendant exercised at the moment." This case, as presented in the evidence and summed up by the learned chief justice, would seem to have presented a much stronger occasion for the instructions now under consideration than the one before us; yet the question of the excess of authority was distinctly submitted to the jury, although the result could not have been doubtful.

In *Eyre v. Norsworthy*, 4 Car. & P. 502, which was trespass brought by a waterman, who had wrongfully attached his boat to the defendant's ship by a rope, against the captain of the ship who had thrown a stone against him to make him let go the rope, the defendant filed two special pleas justifying the throwing of the stone as absolutely necessary to cause the boat to be cut off, and because the object could be effected in no other mode. The same learned chief justice, in closing his charge to the jury, said: "The points for your consideration are these: 1. Are you satisfied that in its natural and necessary consequence the throwing of a stone tends to loosen and disannex a rope? If you are not, then you will find for the plaintiff; and 2. If you think that there was any other practicable mode by which the effect could have been produced, in that case you will find your verdict for the plaintiff."

So also in *Sampson v. Smith*, 15 Mass. 366, where the jury were instructed that if they believed from the evidence the punishment inflicted by a ship-master was cruel and vindictive they should find for the plaintiff, although he had rendered himself liable to punishment, which the defendant had the right to inflict. The true rule on this subject, to be deduced from all the authorities, would seem to be that whenever the justification of any act alleged to be wrongful and injurious is based on the exercise of authority, whether that authority be incident to the official character and duty of the party exercising it, or arise from the misconduct of the opposite party and the necessities of the case, the question of the excess of such authority is to be determined by the jury, upon the evidence submitted for their consideration, and not by the court.

Applying this rule to the case before us, we are clearly of opinion that the jury should have been instructed to say, upon all the evidence presented before them, whether the defendant did his duty under his authority as a conductor, under the statute, in ejecting the plaintiff from the cars at the time and place

and in the manner he was shown to have done it. Instead of this, as they were instructed that the plaintiff was entitled to their verdict as a matter of law, leaving only the amount of damages to be determined by them, the verdict must be set aside and a new trial granted.

RAILROADS, RIGHT TO MAKE REASONABLE REGULATIONS AS TO PASSENGERS: *Cheney v. Boston & Me. R. R. Co.*, 45 Am. Dec. 190, and note; *Commonwealth v. Power*, 41 Id. 465, and note; and see particularly, as to right to discriminate between fares paid on cars and at station, Id. 482.

CASES
IN THE
COURT OF CHANCERY
OF
NEW JERSEY.

JOHNSON v. HUBBELL.

[2 STOCKTON'S CHANCERY, 332.]

ONE MAY MAKE VALID AGREEMENT BINDING HIMSELF legally to make a particular disposition of his property by last will and testament.

SPECIFIC PERFORMANCE OF AGREEMENT TO MAKE PARTICULAR DISPOSITION OF PROPERTY BY WILL will be decreed by a court of equity upon the recognized principles governing it in the exercise of this branch of its jurisdiction.

PART PERFORMANCE OF PAROL AGREEMENT to make a particular disposition of property by will takes it out of the statute of frauds.

SPECIFIC PERFORMANCE OF PAROL AGREEMENT WILL BE COMPELLED by a court of equity, where one party to it has wholly or partially performed it on his part, so that its non-fulfillment by the other party is a fraud.

COURT OF EQUITY WILL NOT DISREGARD AND INVADE RIGHTS OF INNOCENT PARTIES, in order to aid one who has a right to invoke the protection of the court.

COURT OF EQUITY WILL NOT DECREE SPECIFIC PERFORMANCE EXCEPT in cases where it would be strictly equitable to make such a decree.

SPECIFIC PERFORMANCE CANNOT BE DEMANDED AS MATTER OF RIGHT. It is a matter of discretion in the court which withholds or grants relief, according to the circumstances of each particular case, where the general rules and principles governing the court do not furnish any exact measure of justice between the parties.

THE facts are stated in the opinion.

John T. Nixon and William L. Dayton, for the complainant.

A. Sinnickson, J. F. Randolph, and A. Browning, for the defendants.

By Court, **WILLIAMSON**, Chancellor. Hannah Johnson, the mother of the complainant, died in the year 1811. At the time

of her marriage with the complainant's father, Robert Johnson, she was seised and possessed of a very large and valuable estate in the county of Salem. During the coverture she joined with her husband in a conveyance of a part of this estate for the consideration of twenty thousand dollars, which consideration was received by her husband, and by him expended in the improvement of real estate which he held in his own right. At her death, the value of the real estate which Hannah Johnson left was about eighty thousand dollars. She left two children, who inherited this estate, the complainant and his sister, Anna G. Hubbell, one of the defendants to this suit. By the then existing laws of this state regulating descents, the complainant was entitled to two thirds and his sister to one third of the estate which they inherited from their mother. Robert Johnson, the father, being tenant by the curtesy, was in the possession of the real estate of his wife, and received the rents and profits up to the time of his death in 1850. Before the complainant came of age his father complained to his son of the inequality of the disposition made by the law of his mother's estate, and expressed to him his wishes that when his son should arrive at age he would divide his mother's property equally with his sister; and his father said to his son, if he would make such equal division, then that he would leave his estate equally between his two children, and that if his son did not so divide it, then he would feel constrained to make by will an unequal division of his own estate between his son and daughter, and leave the larger portion to his daughter. The daughter was present at this time, and expressed her concurrence in the views of her father.

Shortly after the complainant came of age the father took his two children into his private office, and there produced and laid before them the title papers and maps of their mother's estate, and also of his own real estate, and explained to them the location and value of the respective portions, and urged the complainant to divide equally with his sister their mother's estate. The father then agreed and promised, in the presence of his daughter, that if his son would execute the necessary deeds for an equal partition of the mother's estate that he would leave all his own property equally to his children, share and share alike. He at the same time declared that if his son refused to comply with his wishes that he would leave his estate to his daughter, which would make her share in both estates more than equal to his son's. In consideration of the promise and agreement so made by his

father, the son agreed that an equal division of his mother's estate should be made between himself and sister, and that the father should make the division so agreed upon.

To carry out the agreement, deeds were drawn and prepared under the direction of the father. After the papers were prepared he called his children again into his office, and there remarked to the officer, who was then present to take the acknowledgments of the deeds, that it was unnecessary to enter into a minute explanation of the character of the deeds, as his children knew all about them. Mutual releases between the son and daughter were then executed to complete the division. These papers were executed, and bear date the seventh of September, 1833.

On the twelfth of October, 1836, Anna G. Hubbell conveyed to her father a part of the land, which, in the division, was released to her by the complainant, and known by the name of the "Guinea farm." The consideration expressed in the deed was two thousand dollars. The actual value of the farm was twenty thousand dollars. On the twentieth of April, 1850, Robert Johnson made his last will, by which he entirely cut off and excluded his son from all right and participation in his estate therein devised. As to the "Guinea farm," he died intestate. All the rest of his property, which was a very large and valuable real estate, he disposed of by his will. A very large portion of it he devised to his daughter for life, and at her death to her three children in fee-simple, or in case of their death, to other devisees named in the will. The residue of his real estate mentioned in the will the testator devised to his two nephews, Thomas and Andrew Sinickson.

Robert G. Johnson died in October, 1850, and the devisees are in possession under the will.

These are the facts stated in the bill. The bill is demurred to, and these facts must be taken as true. The bill prays that the agreement between the complainant and the said Robert G. Johnson may be specifically performed and carried into execution by the defendants, and they be decreed to convey to the complainant the equal one-half part of the estate of the said Robert G. Johnson; or, if it should be deemed more equitable and just, that the said Anna G. Hubbell be decreed to reconvey to the complainant the land which she received from the complainant as the consideration for the performance of his part of the said agreement.

There can be no doubt but that a person may make a valid

agreement, binding himself legally to make a particular disposition of his property by last will and testament. The law permits a man to dispose of his own property at his pleasure, and no good reason can be assigned why he may not make a legal agreement to dispose of his property to a particular individual, or for a particular purpose, as well by will as by a conveyance to be made at some specified future period, or upon the happening of some future event. It may be unwise for a man in this way to embarrass himself as to the final disposition of his property, but he is the disposer, by law, of his own fortune, and the sole and best judge as to the time and manner of disposing of it. A court of equity will decree the specific performance of such an agreement upon the recognized principles by which it is governed in the exercise of this branch of its jurisdiction. In the case of *Rivers v. Rivers's Ex'rs*, 3 Desau. 195 [4 Am. Dec. 609], the court, in sustaining the propriety of a court of equity recognizing and enforcing such an agreement, very properly remarked that a man might renounce every power, benefit, or right which the laws give him, and he will be bound by his agreement to do so, provided the agreement be entered into fairly, without surprise, imposition, or fraud, and that it be reasonable and moral.

In *Izard v. Middleton*, 1 Desau. 116, there is a note to the case, in which most of the old authorities bearing upon this subject are collected. There are two classes of authorities there collected, one of which relates to the subject of agreements by two parties to make mutual wills in favor of each other, on certain contingencies; and the other, in which courts of equity have decreed the specific performance of agreements connected with testamentary or other settlements. In addition to the cases cited in this note, I would refer to the case of *Lord Walpole v. Lord Orford*, 3 Ves. jun. 402; *S. C. sub nom.*, *Lord Walpole v. Lord Cholmondeley*, 7 T. R. 138; *Lewis v. Madocks*, 8 Ves. 150; *Fortescue v. Hennah*, 19 Id. 71; and a note to *Randell v. Willis*, 5 Id. 266, in which a report of the case of *Jones and Wife v. Martin*, 3 Anst. 882, is given at length; *Podmore v. Gunning*, 7 Sim. 644; *Moorhouse v. Colvin*, 9 Eng. L. & Eq. 136.

The case of *Jones and Wife v. Martin*, *supra*, was this: by articles executed upon the marriage of Mr. and Mrs. Jones, the father of Mrs. Jones covenanted to leave her, upon his death, certain tenements; and that he would at his decease, by his will, give and leave her a full and equal share, with her brother and sister, of all his personal estate, to be held and enjoyed immediately after the decease of himself and his wife, and not before.

The father, for the purpose of defeating the articles of settlement, conveyed a large part of his property, consisting of East India stock, to his son. On appeal, it was decreed that the stock and dividends were subject to the covenants. In the case of *Fortescue v. Hennah*, 19 Ves. 66, it was determined that where a father, by indenture, covenants for an equal division, at his death, of all the property he should die seised or possessed of between his two daughters or their families, though he retains the power of free disposition by act in his life, cannot defeat the covenant by a disposition in effect testamentary, as by reserving to himself an interest for life. Following the principles established by these authorities, it was decided in the case of *Rivers v. Rivers's Ex'rs*, 3 Desau. 195 [4 Am. Dec. 609], before referred to, that where a woman about to marry a man had agreed in writing to renounce all claims on his estate on his agreeing to make adequate provision for her, and had made provision for her by will and deed, that the court would see the agreement executed by enlarging the provisions, if in the opinion of the court it was not an adequate provision in proportion to the estate. The authority established in all these cases has recently been very fully recognized in the house of lords, in the case of *Logan v. Wienholt*, 7 Bligh N. S. 53, 54, and the substance of which is given as follows, in 2 Story's Eq. Jur., sec. 786: If a person covenants, or agrees, or in any other manner validly binds himself to give to A, by his will, as much property as he gives to any other child, he may put it out of his power to do so by giving away all his property in his life-time; or, if he binds himself to give to A as much as he gives to B, by his will, he may in his life-time give to B what he pleases, so as, by his will, he shall give to A as much as he gives to B. But then the gifts which he makes in his life-time to B must be out and out. For if, to defraud or defeat the obligation which he has thus entered into, he gives to B any property, real or personal, over which he retains a control, or in which he reserves an interest to himself, then in order to protect the agreement or obligation, and to prevent his escaping, as it were, from his own contract, courts of equity will treat this gift to B in the same manner as if it were purely testamentary, and were included in a will; and the subject-matter of the gift will be brought back, and made the fund out of which to perform the obligation. At all events, it will be made the measure for calculating and ordering the performance of and dealing with the claim arising under the agreement or obligation.

This agreement, then, made between the complainant and his father, was a legal agreement. And this court should decree its execution, if, in the exercise of its legal discretion, it can do it without violating any principle of equity or doing injustice to any third party who may be innocently involved in the transaction. Generally, the agreement may be enforced without any embarrassment. If A enters into an agreement, for which he receives a good consideration, with B, to give him his property by will, and in violation of his agreement he gives it, by his will, to C., the court will declare C a trustee for B. In doing this, it does C no wrong. A having undertaken to make to C a voluntary gift of that which he had no right in law so to dispose of, the court does C no injustice, and violates none of his rights, by declaring him a mere trustee. To permit C to hold the property as against B, the court would sanction the fraud which A had committed in disposing of the property in violation of his agreement.

Several objections are made to the court's decreeing a specific performance in this case, in addition to the general one which I have considered.

It is said that this agreement was in parol, and is therefore contrary to the statute of frauds. But although this agreement was a mere parol one, if there was a part performance of it, of such a character as, upon the principles recognized and acted upon by this court, will take a parol agreement out of the statute, then there is nothing peculiar about an agreement of this kind to exclude it from the operation of those principles. If one party to a parol agreement has wholly or partially performed it on his part, so that its non-fulfillment by the other party is a fraud, the court will compel a performance. In this case, the son performed his part of the agreement. He paid a valuable consideration, and parted with his property. In fact, everything was done and performed by both parties that the character of the transaction would admit of. The part of the agreement which the son was to perform was to be performed in *præ-senti*, and that part to be performed by the father was to be performed in *futuro*. There is no uncertainty about the agreement in the slightest respect. It is definite and certain in every particular. It is specifically set out by the complainant in his bill, and the agreement, as alleged, is admitted by the demurrer. There is no objection to a decree on the ground of the contract not being in writing.

It was again objected that the peculiar character of the com-

tract is such as should induce a court to refuse its aid in carrying it into execution, that it was a mere promise made by a father to his son, and ought not to be looked upon as a binding agreement; and that it is bad policy for the court to recognize an agreement made between a father and son, that the father will devise to his son the whole or any considerable portion of his property; that such an agreement has a tendency to destroy that mutual relationship which ought to exist between father and son, and should not, therefore, be sanctioned by a court of equity. I do not consider the agreement in question objectionable upon any of these considerations. It cannot be regarded as a mere promise, which the son relied upon as such, and trusting alone to the honor and word of his father. Here was the son just of age, the owner of a large and very valuable property which he inherited from his mother. There were but two children, and the father was himself possessed of a large estate. He was desirous of a family arrangement with regard to both estates. He pressed the propriety of it upon his son while he was yet in his minority and under his parent's control. He solicited and insisted upon the arrangement after his son arrived of age, and he enforced his wishes, and exerted his parental authority, by declaring to his son that if he refused to make the arrangement he should be disinherited and cut off from all share in his father's estate. He fixes the terms of the agreement himself. He requires of his son, as his part of the agreement to be performed, that in this family arrangement he shall part with one sixth of his estate. An agreement or family arrangement like this is favored in a court of equity. Marriage settlements and agreements for family arrangements with respect to property are viewed with favor by this court. They ought to be respected and scrupulously carried out by the parties to them, and if they are not, a court of equity ought to enforce their execution. Does it not present a case for the favorable consideration of a court of equity, where a son arriving of age, entitled in his own right to a large estate, obedient to parental authority, enters into a family arrangement with his father, at the father's request, by which he parts with a valuable portion of his inheritance, and that son afterwards, without any reason disinherited by his father, comes into a court of equity to ask that the family arrangement may be carried into execution? As far as the circumstances of that arrangement are before the court, it appears to have been an equitable one and perfectly proper, and that gross injustice has been done to the complainant by his father's refusal.

ing to comply with his agreement, and to carry out fairly the family arrangement which was made at his solicitation, accompanied with all the persuasion and influence of parental authority. The complainant is certainly entitled to some relief; and if there is any insurmountable difficulty in decreeing the agreement to be specifically performed, the court will endeavor to give him relief in some other shape.

There are difficulties in the way of enforcing the performance of this agreement specifically, which appear to me to be insurmountable. The complainant has a right to the protection of this court, and to its aid in establishing and enforcing his rights. But if that protection and aid cannot be afforded him without invading and disregarding the rights of others, this court may not, in its anxiety and desire to relieve one party, inflict a wrong and injury upon another entirely innocent in the transaction.

The agreement on the part of the father was that he would leave all his property equally between his two children, the complainant and his sister. The father has violated his agreement as to both, and has disappointed the expectations as well of his daughter as of the complainant, his son. But it is manifest that this court cannot decree the daughter entitled to one half of the property. She was no such party to the agreement as entitled her to have it specifically enforced for her benefit. She agreed to nothing on her part; there was nothing on her part to be performed. She received the consideration which her father exacted for his part of the agreement. She was benefited, and not injured, by the agreement, as far as it was performed. Suppose the court should declare that the complainant has an attaching equitable trust in the testator's estate in the hands of the devisees under the will, and is entitled to one half that estate. Of such a decree the grandchildren or nephews, who are devisees, would have no right to complain, because what the testator devised to them he had no right so to dispose of. He had agreed to dispose of it otherwise, and the party to that agreement claims the benefit of it. But not so with Mrs. Hubbell. By the agreement she was to have one equal part of the estate with her brother. She has been disappointed as well as he in her expectations, and she has only a life estate in a part, instead of a fee-simple in one half the property. How can I carve out of this estate, devised as it is, the portion which the complainant claims, without doing an injury and injustice to Mrs. Hubbell? Mrs. Hubbell is not in any way responsible

for the will of her father. It is not alleged that she controlled him, or endeavored to control him, in making his will. She is an innocent party, and entitled as much to the protection of the court as the complainant. Suppose I was to take out of this estate one half of it for the complainant, I could not alter the character of the estate which the devisees have under the will to the other half. Mrs. Hubbell then would necessarily have a life estate only in a little more than one half of what is given her by the will; and yet, retaining all the will gives her, it is not equal to the absolute property in one half of the estate, which, if the agreement had been performed, she would have been entitled to.

Now, although the agreement upon which the bill is filed is a legal one, it does not follow that a court of chancery will decree its specific performance. It is not a matter of right in either party that the court should make such a decree; but it is a matter of discretion in the court, which withholds or grants relief, according to the circumstances of each particular case, when the general rules and principles which govern the court will not furnish any exact measure of justice between the parties: 2 Story's Eq. Jur., sec. 742. Courts of equity will not enforce the specific performance of a contract at the instance of a vendor, where his title is involved in difficulties which cannot be removed, although it may be a case where, at law, an action may be maintained for damages; or in a case where the character and condition of the property to which the contract is attached have been so altered that the terms and restrictions of it are no longer applicable to the existing state of things; or in cases where, from a change of circumstances or otherwise, it would be unconscientious to enforce it. The proposition may be more generally stated, that courts of equity will not interfere to decree a specific performance, except in cases where it would be strictly equitable to make such a decree: *Id.*, secs. 749, 750, and notes.

In this case, the situation of the property to which the contract is attached is such, and the rights of third parties are so involved in the subject-matter of the controversy, as to render it extremely embarrassing and difficult to carry into effect a decree for specific performance. I arrive at this conclusion with less reluctance than I otherwise should, from the consideration that the complainant is not entirely remediless in the premises.

The consideration of the agreement on the part of the complainant was that he should convey to his sister one sixth part

of his inheritance which he had received from his mother. Mrs. Hubbell was present when the arrangement was made. It was a family arrangement, made between the father, son, and daughter. The daughter assented to it; and to carry out the family compact, she accepted from her brother a conveyance of the land, which was the performance of his part of the contract. She accepted it upon the terms of the agreement, which terms, if faithfully carried out, would have conferred additional benefits upon herself as well as her brother. The family arrangement has not been carried out, and it is against equity and good conscience that the sister should continue in the enjoyment of her brother's land without compensation or satisfaction.

There are several objections interposed to this form of relief. It is said no fraud is imputed to any of the parties at the time of making the agreement, and no fraud is alleged to have been committed by Mrs. Hubbell since; that Mrs. Hubbell made no promise which was to be fulfilled on her part, and that she is not responsible for the non-fulfillment of the agreement by her father.

The fraud of the father was in not making his will, and dividing his estate between his children. It does not divest the breach or non-fulfillment of the contract of its fraudulent character because the fraud was not meditated at the time the agreement was made. The fraud of the daughter consists in retaining her brother's land without consideration, which is against good conscience. It is to protect the complainant against this fraud that this mode of relief is proper. That Mrs. Hubbell made no agreement or promise with her brother that she would be responsible that the contract should be carried out does not make it the less unconscionable that she should hold her brother's land, conveyed to her under a family compact made for their mutual benefit, which has failed of execution through default of neither of them, but of a third party. She accepted the land under the family arrangement; that arrangement has fallen through. The position of the complainant is of some consideration with the court. She was one of the heirs at law of Robert G. Johnson. He is not only a sufferer by the father's violation of the agreement, but without cause has been disinherited; and that which in law and justice belonged to him by his double right as heir and by contract is all, or nearly all, bestowed upon his sister and her children. Under such circumstances, to permit the sister to enjoy, without any consideration, a part of that inheritance which the complainant derived

from his mother is unjust, and a court of equity ought to prevent it.

This relief the complainant is not entitled to under the present bill, as it is framed. The demurrer is therefore well taken, and must be sustained with costs. The complainant is at liberty to amend his bill, if he sees proper, upon the usual terms, so as to adapt it to the views I have expressed and to the relief suggested.

WHAT ACTS CONSTITUTE PART PERFORMANCE OF VERBAL CONTRACT SO AS TO TAKE CASE OUT OF STATUTE OF FRAUDS: See extended note to *Christy v. Barnhart*, 53 Am. Dec. 539, discussing the subject.

SPECIFIC PERFORMANCE, CONTRACT MUST BE CLEAR AND CERTAIN TO OBTAIN: See *Robbins v. McKnight*, 45 Am. Dec. 406, and note to same 411, containing collected cases.

ENFORCEMENT OF CONTRACTS BECAUSE OF PART PERFORMANCE HAS NO EXISTENCE AT LAW: See extended note to *Norton v. Preston*, 32 Am. Dec. 129, discussing the matter.

SPECIFIC PERFORMANCE IS NOT MATTER OF COURSE, BUT IS WITHIN SOUND DISCRETION OF COURT: See *Young v. Daniels*, 63 Am. Dec. 477, and collected cases in note thereto 485.

WHAT PARTY SEEKING SPECIFIC PERFORMANCE MUST SHOW: See note to *Norton v. Preston*, 32 Am. Dec. 129; *Rogers v. Saunders*, 33 Id. 635; *Hoen v. Simmons*, 52 Id. 291; *Garretson v. Vanloon*, 54 Id. 492.

TRUSTS AND FRAUDS ARE NOT WITHIN STATUTE OF FRAUDS: *Grove's Heirs v. Fulsome*, 57 Am. Dec. 247.

PARTIAL AGREEMENT PARTLY PERFORMED OR EXECUTED WILL BE ENFORCED WHEN: *Pugh v. Good*, 37 Am. Dec. 534; *Hudson v. Layton*, 48 Id. 167, and references in note to same 172; *Aday v. Echols*, 52 Id. 225; *Hazleton v. Putnam*, 54 Id. 158.

CITATIONS OF PRINCIPAL CASE.—In *Van Duyne v. Vreeland*, 12 N. J. Eq. 146, S. C., 11 Id. 370, the agreement stated in the bill, and the circumstances under which it was made, were as follows: "That it was made about thirty-three years prior to the filing of the bill; that the complainant's mother was the sister of the former wife of the defendant Vreeland; that the said Vreeland and his said wife had no children; that as soon as the complainant was born Vreeland and his wife requested the complainant's father and mother to let them take the complainant and permit them to adopt and keep him as their son, and as an inducement for them to do so, they promised his parents to treat the complainant as their own son, and that all the property they had should be given to the complainant, so that it should belong to him at the death of Vreeland and his wife." Nothing was said about the mode of transfer. The chancellor did not consider this agreement indefinite and uncertain, and thought that there was not the least difficulty as to the legal construction to be put upon the agreement as it was stated in the bill. "The complainant," said he, "during the life-time of Vreeland and his wife, or either of them, could not make any demand for any part of their property, or for the execution of any deed or writing to secure to him its enjoyment after their death. It was upon their death that he was entitled to the property, and it mattered not to him whether he derived it by deed or by devise. The agreement put no restraint

whatever upon the parties to the free and unrestricted enjoyment of their property. They might give it away while they lived, but they could not make a disposition of it to take effect at their death. What property they left at their death they had agreed that the complainant should have." To this point the principal case was cited. In *Davison v. Davison*, 13 N. J. Eq. 252, the principal case was cited to the point that a valid agreement in law may be enforced in equity. The agreement there was that there was a distinct understanding between complainant and his father that the son should be compensated for his services, and should, upon his father's death, provided he continued to serve and provide for him during life, receive the homestead farm. The son remained and worked the farm for upwards of fifteen years to the satisfaction of the father, who then became displeased with him, and conveyed the farm to his other two sons, in consideration of maintenance for life. It was held that the complainant, upon the performance of the agreement on his part, or upon his readiness to perform, if prevented by the acts of defendants, would be entitled to the farm upon the death of the father, and that the deed executed to the other two sons be set aside as fraudulent and void against complainant, and that defendants be restrained from aliening, charging, or encumbering the said farm. In *Tillotson v. Geener*, 33 Id. 327, the principal case was cited to the point that the court cannot satisfactorily or conclusively settle a title in the absence of parties who are not before them in the suit to assert their estate or interest in the lauds. It was contended in *Larison v. Polhemus*, 36 Id. 510, that the evidence in that case brought it within the rule laid down in the principal case, as well as in *Davison v. Davison*, *supra*, and *Van Duyne v. Vreeland*, *supra*; but the vice-chancellor thought there was a very much greater degree of certainty in each one of those cases. "In this case," said he, "it is quite impossible to determine what was meant by the phrase, 'the boys are to have the farms,' and other similar ones." There seems to have been no such part performance here, or recognition of the contract in that case, as would justify specific performance. In *Smith v. Administrators of Smith*, 28 N. J. L. 216, the principal case was cited to the point that where it is clear from the evidence that the erection of buildings was not a voluntary service, nor a service rendered relying upon the generosity of the intestate to make compensation, and where the son expressly refused to proceed with the buildings till he had his father's promise that the farm should be his, the case does not fall within the familiar principle that no promise can be implied to pay for gratuitous services, or services rendered in expectation of a legacy.

AGREEMENTS TO MAKE PARTICULAR DISPOSITION OF PROPERTY BY WILL.—

1. VALIDITY OF SUCH AGREEMENTS.—It is not only in harmony with sound principle that a person may make a valid agreement binding himself to dispose of his property, in a particular way, by last will and testament, but it is supported by an almost unbroken current of authorities, both English and American: See *Wright v. Tinsley*, 30 Mo. 389; *Gupton v. Gupton*, 47 Id. 37, reviewing the cases; *Sutton v. Hayden*, 62 Id. 101, the briefs containing voluminous citations; *Van Duyne v. Vreeland*, 12 N. J. Eq. 142; S. C., 11 Id. 370; *Davison v. Davison*, 13 Id. 246; *Carlisle v. Fleming*, 1 Harr. (Del.) 421; *Isard v. Middleton*, 1 Desau. Eq. 116, and note with collected English authorities; *Rivers v. Rivers's Ex'rs*, 3 Id. 190; S. C., 4 Am. Dec. 609; *Wright v. Wright*, 31 Mich. 380; *Mundorff v. Kilbourn*, 4 Md. 459; *Frisby v. Parkhurst*, 29 Id. 58; *Logan v. McGinnis*, 12 Pa. St. 27; *Maddox v. Rowe*, 23 Ga. 431; *Watson v. Mahan*, 20 Ind. 223; *Stephens v. Reynolds*, 6 N. Y. 459; *Parcell v. Stryker*, 41 Id. 480; *Rhodes v. Rhodes*, 3 Sandf. Ch. 279; *Shakespeare v. Markham*, 1.

Hun, 311, containing a review of the cases, and voluminous citations in the briefs; *Logan v. Wienholt*, 1 Cl. & Fin. 611; S. C., 7 Bligh, N. S., 53; *Needham v. Smith*, 4 Russ. 318; *Lester v. Foxcroft*, Colles, 108; *Fortescue v. Hennah*, 19 Ves. 67; *Lord Walpole v. Lord Orford*, 3 Id. 402; *Goultmere v. Battison*, 1 Vern. 48; S. C., 2 Vent. 353; *Jones v. Martin*, 3 Anst. 882; see note to *Randall v. Willis*, 5 Ves. 266; *Stockley v. Stockley*, 1 Ves. & B. 30. *Contra: Harder v. Harder*, 2 Sandf. Ch. 17, holding that a parol agreement to leave lands to a person by will, though founded on a precedent valuable consideration, cannot be enforced in equity; and *Stafford v. Bartholomew*, 2 Cart. 153, holding that a contract to devise lands cannot be specifically enforced.

2. MODE OF ENFORCEMENT AT LAW.—It is obvious that an agreement to make a certain disposition of property by devise is one which, strictly speaking, will not support an action in the party's life-time, because any testamentary instrument is by its nature revocable; no one can tell what it will be until the maker dies, and he has his whole life in which to perform his covenants. Where a party renders services to another in the expectation of a legacy, and in sole reliance on the testator's generosity, without any contract, express or implied, that compensation shall be provided for him by will, and the party for whom such services are rendered dies without making such provision, no action lies; but where, from the circumstances of the case, it is manifest that it was understood by both parties that compensation should be made by will, and none is made, an action does lie to recover the value of such services: *Martin v. Wright's Adm'rs*, 13 Wend. 460; S. C., 28 Am. Dec. 468; *Patterson v. Patterson*, 13 Johns. 379; *Jacobson v. Executors of Le Grange*, 3 Id. 199; *Quackenbush v. Ehle*, 5 Barb. 469; *Lisk v. Sherman*, 25 Id. 433; *Robinson v. Rayner*, 28 N. Y. 494; *Shakespeare v. Markham*, 10 Hun, 322; *Graham v. Graham's Ex'rs*, 34 Pa. St. 475. *Assumpsit*, either express or implied, as the case may be, can be brought: *Updike v. Ten Broeck*, 32 N. J. L. 105; *Quackenbush v. Ehle*, 5 Barb. 469; *Jacobson v. Ex'rs of Le Grange*, 3 Johns. 199; *Graham v. Graham's Ex'rs*, 34 Pa. St. 475; *Roberts v. Swift*, 1 Yeates, 209; S. C., 1 Am. Dec. 295; *Neal's Ex'rs v. Gilmore*, 79 Pa. St. 421; and one entitled to recover may do so on the common counts for work and labor: *Updike v. Ten Broeck*, *Quackenbush v. Ehle*, *supra*; *Smith v. Smith's Adm'rs*, 28 N. J. L. 217; and it is immaterial whether the promise be made before or after the service: *Snyder v. Castor*, 4 Yeates, 358. Where one performs services under an agreement that he shall be compensated by will, a difficult question sometimes arises as to when his compensation becomes due, which fact of course will determine when the statute of limitations commences to run: See *Kent v. Kent*, 62 N. Y. 560; S. C., 20 Am. Rep. 502. Where the promisee serves until the death of the promisor, and who has failed to devise as he has promised, there is no difficulty; but where the promisor has repudiated his contract before death, and dismissed the promisee, the question is not so easy of solution. In *Patterson v. Patterson*, 13 Johns. 379, it was held that where one performs services under an agreement that he shall be compensated by will, his demand for compensation is not due until the death of the one who is to make the will for such purpose; and that an action brought before that time is premature, for it will be presumed that the testator intended to make the promised provision in his will. This, however, was doubted in *Updike v. Ten Broeck*, 32 N. J. L. 119. There was no decision in this case as to when it would commence to run, but it was decided that the fact that the contract was not in writing could not in any way affect the question when the statute begins to run. Where it is understood that compensation is to be made, it is immaterial whether the failure to make it arose

from accident or design; and the party rendering the services is entitled to compensation out of the decedent's estate, as a creditor, for the value of his services: *Robinson v. Raynor*, 28 N. Y. 494. But the parol contract of a decedent to give a person a certain portion of his estate in consideration of services rendered cannot be enforced unless the contract is clearly proved by direct and positive evidence, and its terms are definite and certain: *Bowen v. Bowen*, 2 Bradf. 336. A promise to give plaintiff, in consideration of services, "as much as any relation he had on earth," is too indefinite and uncertain to be enforced against the executors of the promisor: *Graham v. Graham's Ex'rs*, 34 Pa. St. 475. In *Poorman v. Kilgore*, 26 Id. 365, will be found a discussion of the law of evidence that may grow out of the family relations, and showing that a contract between parents and children should be proved by a kind of evidence very different from that which may be sufficient between strangers. And in *Neal's Ex'rs v. Gilmore*, 79 Id. 428, it is said that in claims against the estates of decedents for services rendered by members of their family, it is important "that the reins should be held by the courts with a firm and steady hand. There should be great precision and positiveness in the instructions given to the jury, who are too apt to be carried away by their sympathy for claimants who have been disappointed in their perhaps just and reasonable expectations from the gratitude or affection of decedents." The measure of damages in an action for a breach of a promise to make a particular disposition of property by will is the value of the services rendered, according to their kind and character. If the land or other property to be rendered in payment for services is fixed and determined in its character, is referred to by the parties in the contract, and possessed at the time of making the contract a determinable value, then the contract will furnish a measure of damages; and it is only in such cases that the value of the property agreed to be conveyed or delivered can be said to be settled between the parties as the value of the services rendered in payment for it: *Graham v. Graham's Ex'rs*, *supra*; *Link v. Sherman*, 25 Barb. 433. And the rule that a void contract can be resorted to for the purpose of determining the value of services rendered in pursuance of it is confined to such cases: See case last cited. The condition of the law upon the question as to whether a parol contract to make a particular disposition of property by will is within the statute of frauds, as one not to be performed within a year, is uncertain: *Shakespeare v. Markham*, 10 Hun, 323. The following cases hold that it is within the statute, and therefore void: *Link v. Sherman*, 25 Barb. 433; *Smith v. Smith's Adm'rs*, 28 N. J. L. 216; but there is other authority that such a contract is not within the statute, and therefore not void: *Dresser v. Dresser*, 35 Barb. 573; *Kent v. Kent*, 3 N. Y. Super. Ct. 630; S. C., 1 Hun, 529; *Jilson v. Gilbert*, 26 Wis. 637; S. C., 7 Am. Rep. 100; *Kent v. Kent*, 62 N. Y. 560; S. C., 20 Am. Rep. 502. And the reasons for this latter rule seem to be sound. The statute, it is said, plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed; a contingency is not within it, nor any case that depends on a contingency; and it does not extend to cases where the thing may be performed within the year: See *Fenton v. Emblers*, 3 Burr. 1278; *Anonymous*, 1 Salk. 280; *Peter v. Compton*, Skin. 353; *Ridley v. Ridley*, 34 Beav. 478; *Updike v. Ten Broeck*, 32 N. J. L. 116; *Doyle v. Dixon*, 97 Mass. 208; *Peters v. Westborough*, 19 Pick. 364; S. C., 31 Am. Dec. 142; *Lyon v. King*, 11 Met. 411; *Worthy v. Jones*, 11 Gray, 168; *White v. Hanchett*, 21 Wis. 415. In *Peters v. Westborough*, 19 Pick. 364, S. C., 31 Am. Dec. 142, it is said that a parol contract to support a person for a certain number of years is not within the statute; for if he die within one year, hav

ing been supported under the contract until his death, the contract will have been fully performed. The fact, however, that the contract is void by the statute of frauds would be rendered immaterial where the contract itself is not sued upon, but an action is brought for the services rendered under the common counts. And such action may be sustained after the death of the promisor, where he has either failed to make the promised particular disposition of his property by will, or has repudiated his contract by turning the promisee away after an extended period of service: *Updike v. Ten Broeck*, 32 N. J. L. 116; *Lisk v. Sherman*, 25 Barb. 433. A contract to make a particular disposition of property by will need not be in writing, and when the suit is not brought upon a special contract, but on the ground that the contract was repudiated, an allowance of interest from the end of each year's service is usual and right: *Updike v. Ten Broeck*, 32 N. J. L. 120. And where the employee under a salaried contract is to be compensated in part, in addition to his salary, by a testamentary disposition, and no such provision is made, the employee's estate is liable for enough to make up what the services are reasonably worth. Proof that after the employee had left the service, from dissatisfaction with his salary, the employer induced him to remain by representing "that it should be all right, and that he had remembered him in his will," is sufficient to show such an agreement: *Baylies v. Estate of Pridure*, 24 Wis. 651.

3. MODE OF ENFORCEMENT IN EQUITY. 1. *Specific Performance—Trust.* "There is, upon the authorities," says Talcott, J., in *Shakespeare v. Markham*, 10 Hun, 322, "no doubt that in a case where a certain and definite contract is clearly established, even though it involves an agreement to leave property by will, and it has been performed on the part of the promisee, equity in a case free from all objection on account of the adequacy of the consideration, or other circumstance rendering the claim inequitable, will compel a specific performance, though as an original question it might be considered doubtful whether in any such case, especially when the contract is sought to be established by parol testimony, so patent a means for the evasion of the provisions for the security of property, furnished by the statute of wills, should have been allowed. But courts of equity, having been pressed by the hardship of particular cases, and the unreasonable and perhaps often fraudulent conduct of the decedent, have made precedents on the subject which have resulted in the establishment, as a principle of equity law, that in such cases the court will often decree a specific performance, and charge those holding the property under the will with a trust for the benefit of the party to whom it was agreed to be given." The following cases support these doctrines: *Parrell v. Stryker*, 41 N. Y. 480; *Rhodes v. Rhodes*, 3 Sandf. Ch. 279; *Frisby v. Parkhurst*, 29 Md. 58; *Wright v. Tinsley*, 30 Mo. 389; *Halyburton v. Kershaw*, 3 Desau. 105; *Rivers v. Rivers*, Id. 190; S. C., 4 Am. Dec. 609; *Izard v. Middleton*, 1 Desau. 116, note; *Watson v. Mahan*, 20 Ind. 223; *Brinker v. Brinker*, 7 Pa. St. 53; *Gupton v. Gupton*, 47 Mo. 37; *Maddox v. Rowe*, 23 Ga. 431; *Logan v. McGinnis*, 12 Pa. St. 27; *Mundorff v. Kilbourn*, 4 Md. 459; *Logan v. Weinholt*, 1 Cl. & Fin. 611; *Needham v. Smith*, 4 Russ. 318; *Stockley v. Stockley*, 1 Ves. & B. 30; *Fortescue v. Hennah*, 19 Ves. 67; *Goilmere v. Battison*, 1 Vern. 48; S. C., 2 Vent. 353; *Lester v. Foxcroft*, Colles, 103. And the trustee of an express trust may sue in his own name, or may join the beneficiary as a party in a suit to enforce a contract entered into for the benefit of another: *Wright v. Tinsley*, 30 Mo. 389. The ground on which equity compels a specific performance of a parol agreement concerning lands is the prevention of fraud: *Carlisle v. Fleming*, 1 Harr. (Del.) 430. It is true that in quite a number

of cases the courts have refused to decree the specific performance of a contract to dispose of property by will, but an examination of them will show that they nearly all, either expressly or impliedly, recognised the power of individuals to make binding contracts of this nature, and relief was denied on other grounds. Thus specific performance has been denied on the ground that the evidence concerning the contract to devise was uncertain, and failed to show any definite arrangement in regard to the matter: *Stanton v. Miller*, 58 N. Y. 192; *Wright v. Wright*, 31 Mich. 380; *Carlisle v. Fleming*, 1 Harr. (Del.) 421; *Mundorff v. Kilbourn*, 4 Md. 459; *Isard v. Middleton*, 1 Desau. 116; *Bowen v. Bowen*, 2 Bradf. 336; *Moorhouse v. Colwin*, 9 Eng. L. & Eq. 136; S. C., 21 L. J. Ch., N. S., 177; *Podmore v. Gunning*, 7 Sim. 644; *Barkworth v. Young*, 4 Drew. 1; *Lord Walpole v. Lord Orford*, 3 Ves. jun. 402. In *McClure v. McClure*, 1 Pa. St. 378, it was refused for want of consideration, the son's services not being rendered in execution of the contract, or at the father's request. Where the son performs services under a contract to devise, and quits his father's service after a time, and after he has received a portion of the promised land in compensation for what he has done, a court will not decree the specific performance of the father's contract to convey lands, as the son is not entitled to further compensation. In this case the son went into the army and died, and the father and wife were supported by another son after that time, and to whom the remainder of the land was given, on the father's death: *Cox v. Cox*, 26 Gratt. 305; see *Sprinkle v. Hayworth*, 26 Id. 384. Specific performance will not, of course, be decreed of any contract, when any material part of the terms or conditions are uncertain: *Nichols v. Williams*, 22 N. J. Eq. 63; and contracts to devise property by will in consideration of services should be certain and defined, equal and fair, and proved as the law requires, in all cases where the aid of equity is invoked to have them specifically performed. Parties to such agreements cannot ask the courts to frame contracts in their behalf, and a court will be more strict in examining into the nature and circumstances of such agreements than any others, and will require very satisfactory proofs of the fairness and justness of the transaction: *Wright v. Wright*, 31 Mich. 380; *Mundorff v. Kilbourn*, 4 Md. 459; *Carlisle v. Fleming*, 1 Harr. (Del.) 421; *Stanton v. Miller*, 58 N. Y. 200; *Bowen v. Bowen*, 2 Bradf. 336; *Rivers v. Rivers*, 3 Desau. 196; S. C., 4 Am. Dec. 609; *Van Dugne v. Vreeland*, 12 N. J. Eq. 142; S. C., 11 Id. 370. But courts of equity will sometimes allow a bill to be amended after final hearing, so as to conform to the contract as proved, where that as proved is variant from the one charged in the bill: *Davison v. Davison*, 13 Id. 252. A bill for damages may sometimes be sustained in special cases, where there can be no specific performance: *Wright v. Tinsley*, 30 Mo. 399; *Gupton v. Gupton*, 47 Id. 47; *Legan v. McGinnis*, 12 Pa. St. 27. And although circumstances may render it impossible to specifically enforce an agreement to make a particular disposition of property by last will and testament, yet its substantial specific enforcement will be decreed: *Wright v. Tinsley*, 30 Mo. 389.

2. *Parol Agreements to Devise are within the Statute of Frauds.*—It is now well settled in the courts of equity that if the defendant, by his answer, admits the parol agreement and insists upon the benefit of the statute, he is fully-entitled to it, notwithstanding such admission. But if he admits the parol agreement without insisting on the statute, the court will decree a specific performance, upon the ground that the defendant has thereby renounced the benefit of the statute. If the defendant, by his answer, denies the parol agreement, he need not insist upon the statute as a bar. It is also well settled that a part performance of the agreement on complainant's part,

or part performance on part of defendant himself, will take the case out of the operation of the statute: *Van Duyne v. Freeland*, 12 N. J. Eq. 150; *Davison v. Davison*, 2 Id. 248; *Mundorff v. Kilbourn*, 4 Md. 463; *Rhodes v. Rhodes*, 3 Sandf. Ch. 279; *Carlisle v. Fleming*, 1 Harr. (Del.) 421; *Izard v. Middleton*, 1 Desau. 122; *Gupton v. Gupton*, 47 Mo. 37; *Sutton v. Hayden*, 62 Id. 112. Particularly will a verbal contract of this description be taken out of the operation of the statute, where a refusal to complete the agreement will work a fraud on the other party: *Van Duyne v. Freeland*, 12 N. J. Eq. 150; *Gupton v. Gupton*, 47 Mo. 37. When part performance is relied on as taking a case out of the statute, the acts must be unequivocally in execution of the agreement: *Carlisle v. Fleming*, 1 Harr. (Del.) 421. It seems to be settled that the payment of the consideration will not, in general, be deemed such a part performance as to relieve a parol contract from the operation of the statute. But the reason for this, viz., that in such a case the repayment of the consideration will place the parties in the same situation in which they were before, shows that the rule applies to a moneyed consideration. If the consideration for the contract be labor and services, those may sometimes be estimated and their value liquidated in money, so as measurably to make the promisee whole upon the promisor's rescission of the contract. But in a case where the services rendered were of such a peculiar character that it is impossible to estimate their value to the promisor by any pecuniary standard, and where it is evident that he did not intend to measure them by any such standard, it is out of the power of any court, after the performance of the services, to restore the promisee to the situation in which he was before the contract was made, or to compensate him in damages. Such a case is clearly within the rule which governs courts of equity in carrying parol agreements into effect, where possession has been taken of landed property or moneys laid out in improvements upon land which the testator agreed to devise in consideration of care and maintenance during his life: *Rhodes v. Rhodes*, 3 Sandf. Ch. 279.

3. *Power of Control over Property under Contract of Devise.*—It is evident from the foregoing cases that a covenant may be so framed as to give a party an absolute power of disposal and expenditure during his life, yet prevent him from alienating the property, which is the subject of the covenant, by any disposition which is in effect, though not in form, testamentary; or converting the property so as to hinder its devolution according to the intent of the covenant: See collected cases in note to *Lewis v. Madocks*, 8 Ves. 153. But it by no means follows that because a party is bound by covenant not to alter, by will, the devolution of all such property, real or personal, as he may die seised or possessed of, he is not fully at liberty to dispose of the whole, even by the most idle and wanton expenditure, in his life-time: See note to *Cochran v. Graham*, 19 Ves. 66; *Eyre v. Monro*, 26 L. J. Ch., N. S., 757; *Needham v. Kirkman*, 3 Barn. & Ald. 531; *Gregor v. Kemp*, 3 Swanst. 404. The law permits a man to dispose of his own property at his pleasure; and however unwise it may be for him to embarrass himself as to the final disposition of his property, it will allow him to make a contract for a particular disposition of what he owns at the time of his death. And where the agreement puts no restriction upon him as to the free and unrestricted enjoyment of his property, while he lives he may give it away, but he can make no other disposition of it to take effect at his death, and all that he then leaves is subject to the contract of devise: See principal case, and *Van Duyne v. Freeland*, 12 N. J. Eq. 147. Where a testator has entered into such a contract, he cannot defeat his covenant by making a testamentary disposition of what property he has at the time of his death, or one which is such in effect: *Fortescue*

v. Henshaw, 19 Ves. 67; *Maddox v. Rowe*, 23 Ga. 431; *Brinker v. Brinker*, 7 Pa. St. 53. But where a father made his will, devising certain lands to his son in fee-simple, and charging it with the payment of a certain sum of money and maintenance of testator and his wife during life, it was held, where the son accepted the arrangement and paid a portion of the money, to constitute a testamentary provision merely for the son, and not a contract to devise the land to him in fee-simple; and that the father having afterwards revoked the first will, and devised the land to the son for life, subject to the same charge, it furnished no ground to entertain a bill against the executors of the father to compel a conveyance in fee-simple: *Rowan's Appeal*, 25 Id. 292. And where a crippled person entered into an agreement with one of his sons to leave him his land by will on consideration that he would support the father and mother during their lives, and the son, having received a part of the land in full compensation, went off years afterwards to the army and died, a second agreement of a similar kind with another son was held valid, and the court refused to decree a specific performance of the agreement between the first son and the father: *Cox v. Cox*, 26 Gratt. 306.

WOLCOTT v. MELICK.

[3 STOCKTON'S CHANCERY, 204.]

COURT OF EQUITY HAS POWER, BY INJUNCTION, TO PREVENT OR ABATE NUISANCE materially injurious to the person or property of another; such as one which occasions loss of health, loss of trade, destruction of the means of subsistence, or permanent ruin to property; but it will not interfere to prevent or abate every nuisance.

CASE OF NUISANCE IN WHICH EQUITY WILL INTERFERE MUST BE ONE AT LAW, and in which a party can maintain an action for alleged injury to his legal rights. Thus, chancery will enjoin the prosecution of a legal trade where it is carried on in such a manner as to injure an adjoining tenement, or to affect the air with noisome smells, gases, or smoke, injurious to health, or rendering the enjoyment of life within a neighboring dwelling-house uncomfortable.

COURT OF EQUITY WILL NOT INTERPOSE TO PREVENT NUISANCE OCCASIONED BY CARRYING ON OF LEGAL TRADE, unless such nuisance be in actual existence and established by clear and satisfactory evidence; or unless the prosecution of the business from which the nuisance is apprehended, and the establishment of which the court is called upon to prevent, is of such a character as to necessarily produce the mischief which the court is called upon to prevent.

INJUNCTION TO PREVENT ERECTION OF BUILDING FOR MANUFACTURING PURPOSES, on ground of its being a nuisance to an adjoining dwelling-house, will not be granted unless a very strong case is made, and one which is marked by some very peculiar features.

INJUNCTION WILL SOMETIMES BE GRANTED IN CASE OF MERE APPREHENDED DANGER; as, to prevent the erection of a hospital or of a gunpowder magazine in the neighborhood of a town, and near to dwelling-houses. And this is on the ground of the reasonable fears and apprehensions which such erections excite; but a court of equity will gen-

erally compel an individual who asks protection against inconvenience or apprehended damage, arising from the prosecution of some legal enterprise, to establish his right to protection by the verdict of a jury before it will interfere in his behalf.

COURT OF EQUITY WILL ENJOIN NUISANCE IF IT IS ADMITTED, or if the erection contemplated must from its character necessarily be a nuisance to complainant, and his legal remedy is not adequate.

COURT OF EQUITY WILL NOT ENJOIN ERECTION OF BUILDING IN CITY in which a steam-engine and machinery for manufacturing purposes are to be placed. It will not be assumed that a lawful business is to be so conducted as to render it a nuisance; but if so conducted in fact, injured persons will be protected therefrom.

BILL TO RESTRAIN NUISANCE FROM WHICH INDIVIDUAL SUSTAINS SPECIAL DAMAGE may be filed without making the attorney general a party; although it may be right to make him a party in case of a public nuisance.

ON motion to dissolve.

B. Gummere and W. L. Dayton, for the motion.

James Wilson and M. Beasley, contra.

By Court, WILLIAMSON, Chancellor. The bill in this case is filed by five complainants, each of them owning a dwelling-house, and, except one of them, occupying the same in the city of Trenton. They seek to enjoin the defendants from the erection of a building, intended for manufacturing purposes, in the neighborhood of their dwelling-houses. On presenting the bill to one of the injunction masters of the court an injunction was ordered. The defendants have answered the bill, and counsel on both sides have been heard on a motion to dissolve the injunction.

About fifteen years ago six moderate-sized but handsome dwellings were erected on the southerly side of State street, west of the canal and railroad. Four of these dwellings are owned by the complainants. On the opposite side of State street, in front of these dwellings, which are known as "the cottages," is a tract of land containing some eight or ten acres. In 1849 this tract was laid out into streets and building-lots. On that portion of it lying directly in front of the cottages there is one small dwelling-house, which was erected about three years ago, and is owned and occupied by one of the complainants, Richard C. Wolcott. It is the only dwelling on that part of the tract directly in front of "the cottages," and from anything that appears in the case, there are no actual preparations for the erection of any more. The depots of the Camden & Amboy and Belvidere Delaware railroads, and the basin of the Delaware &

Baritan canal, adjoin the tract on the west, and the principal depot building is within sixty feet of the most westerly of "the cottages," which is kept as a small tavern. On Carroll street, running at right angles with the lots on which "the cottages" are situated, the defendants have purchased a lot, seventy-five feet front and one hundred feet deep. They intend to erect on this lot a three-story brick building, one hundred and thirty-two feet distant from the dwelling-house of the complainant Wolcott, and seventy-one feet from his barn. The distance to the nearest "cottage" will be two hundred and seventy feet. It is the intention of the defendants to place in the building they propose erecting a steam-engine of twenty horse-power, for the purpose of driving turning-lathes, for turning iron and wood, a planing-machine, and other machinery necessary for making agricultural implements, and to carry on that business in the building. The question is, Will the court continue the injunction to prevent the defendants erecting such a building for such purposes, on the ground of its being a nuisance, and as such injurious to the property of the complainants?

The power of the court to interfere by injunction to prevent the erection or continuance of a nuisance which materially injures the property or person of another is not denied. A nuisance is "anything that worketh hurt, inconvenience, or damage:" 3 Bla. Com. 213. But it is not every such nuisance that a court of equity will interfere to prevent or abate by the exercise of its jurisdiction. But "where the injury is irreparable, as where loss of health, loss of trade, destruction of the means of subsistence, or permanent ruin to property, may or will ensue from the wrongful act of erection, in every such case courts of equity will interfere by injunction, in furtherance of justice and the violated rights of the party:" 2 Story's Eq. Jur., sec. 926. The case must be one of nuisance at law, and in respect to which the party can maintain an action for the alleged injury to his legal rights. The court will interpose to prevent the prosecution of a legal trade, where it is carried on in such a manner as to injure an adjoining tenement, or to affect the air with noisome smells, gases, or smoke, injurious to health, or rendering the enjoyment of life within a neighboring dwelling-house uncomfortable. But in such a case the nuisance must be either in actual existence, and established by clear and satisfactory evidence, or the prosecution of the business from which the nuisance is apprehended, and the establishment of which the court is called upon to prevent, must be of a character as necessarily to produce the

mischief which the court is called upon to prevent. It may be very annoying to a man to have a small grocery store erected adjacent to his dwelling-house; the attraction of flies in the summer, and the unavoidable smell it produces, may be extremely disagreeable. The noise of a shoemaker's shop or of a tin-shop would be to some men extremely annoying, and render their dwellings to them uncomfortable. There is no redress for such grievances while the trade is prosecuted in a legal manner. And so, generally, with all manufacturing establishments. Their noise and the bustle they create do not add to the comfort and enjoyment of adjoining dwelling-houses. On the contrary, they are generally very great annoyances; yet our towns and large cities are filled with them. They have been built up by such establishments, and owe their prosperity and growing importance to them. Steam-engines for manufacturing purposes are running day and night in the very heart of our cities. It must be a very strong case, marked by some very peculiar features, to justify a court of equity to interfere by injunction and prevent the erection of a building for manufacturing purposes on the ground of its being a nuisance to an adjoining dwelling-house. The industry of counsel furnished me, on the argument of this case, with most if not all the cases to be found in the books, where the jurisdiction of courts of equity has been invoked to prevent the erection and continuance of nuisances. And yet not a precedent has been found where the court has interfered to prevent the erection of a building to prosecute a manufacturing enterprise similar to the one the defendants propose to establish.

A brew-house, glass-house, lime-kiln, dye-house, smelting-house, tan-pit, chandler's shop, or swine-sty, if set up in such inconvenient parts of the town as that they incommode the neighborhood, are common nuisances: *Waterman's Eden* on Inj. 264, and notes. If it was contemplated to erect such an establishment so near the dwelling-house of an individual that it must necessarily be exposed to the smoke or noisome smells which are the unavoidable consequences of such establishments, the court of chancery might, in most such cases, properly interfere to prevent its erection or continuance; because the nuisance would be of a character to render the occupation of an adjacent dwelling infected by its consequences intolerable. No evidence would be required, in such a case, to establish a nuisance but the fact of its erection and its contiguity to the dwelling. The cautious manner in which the court has exercised its jurisdiction in cases

of nuisances will appear from an examination of some of the authorities.

Baines v. Baker, 1 Amb. 158, was a bill for an injunction to stay building a hospital for people infected with the small-pox in Cold Bath Fields, very near the houses of several tenants of the plaintiff. The injunction was refused; and the lord chancellor said it was a "charity like to prove of great advantage to mankind; such a hospital must not be far from a town, because those that are attacked with that disorder in a natural way may not be in a condition to be carried far." He stated one of the questions to be whether it was a nuisance at common law; and said: "Bills of this sort are founded on being nuisance at common law." This case is frequently cited to show that the court will not interfere in any case to prevent a man's dwelling-house and family from apprehended danger; that the fears of mankind, however reasonable, will not create a nuisance. And in *Anonymous*, 3 Atk. 750, case 288, Lord Hardwicke is reported as using the language, "that the fears of mankind, though they may be reasonable ones, will not create a nuisance." Notwithstanding these authorities, I do not think a court of chancery would now hesitate a moment in granting an injunction to stay the erection of a hospital or of a gunpowder magazine in the neighborhood of a town, and near to dwelling-houses, and on the ground of the reasonable fears and apprehensions such erections reasonably excite. But these cases are important to show that the public good will not be lost sight of; and that generally a court of equity will compel an individual who asks protection against an inconvenience or apprehended damage, arising from the prosecution of some legal enterprise, to establish his right to protection by the verdict of a jury before the court will interfere in his behalf.

In the case of *Fishmongers' Co. v. East India Company*, 1 Dick. 163, and *Attorney General v. Nichol*, 16 Ves. 338, it was very evident that the alleged nuisances were injurious to the complainant's dwellings, diminishing their light, and rendering them less comfortable. The court said in those cases that a diminution of the value of premises is not a ground for injunction; and that while the court might interfere for the protection of ancient lights, it would not interpose upon every degree of darkening ancient lights and windows.

The case of *Attorney General v. Cleaver*, 18 Ves. 211, is much to the point, and the remarks of Lord Eldon worthy of notice. An information by the attorney general, at the relation of several

individuals, was filed to restrain the defendants from manufacturing soap or black ash, and from boiling, melting, calcining, or burning any of the materials used in manufacturing soap or black ash in their manufactory, or that they might be restrained until the trial of an indictment then pending against them. The motion for the injunction was made upon several very strong affidavits, describing the process as both offensive and unwholesome, and stating the effects of the smell from the vapor, even across the river, and farther to a considerable distance. The lord chancellor, in remarking upon the case, observed that he did not recollect in his experience an instance of an injunction actually granted, except a case before Lord Loughborough, and that the only precedents with which he was acquainted for that decision were those in *Ambler and Atkyns*. "What is a nuisance," he says, "considered with reference to carrying on a trade, is a question of fact which is not very easy to determine. I have frequently known verdicts deciding manufactories to be no nuisance, by which, it cannot be denied, the whole comfort of life and health must, in some degree, be affected." He refers to a note of a case of *Duke of Grafton v. Hilliard*, in 1736, in which the duke filed a bill to restrain the defendants from burning brick earth in the fields close to Hanover square. The court refused the injunction, observing that the manufacture of bricks, though near the habitations of men, if carried on for the purpose of making habitations for them, is not a public nuisance. It is very clear that Lord Eldon denied the right of the court to interfere by injunction to prevent the prosecution of a legal trade until it was declared to be a nuisance at law.

In *Crowder v. Tinkler*, 19 Ves. 616, the complainants were carrying on paper-mills, and one of them resided in a house adjoining the mills. The defendants began to erect a building at the distance of about two hundred yards from the paper-mills, intended for a corning-house, or magazine. The lord chancellor said he was inclined to think that an injunction might be granted in the case, upon the head, not of nuisance, but of danger to property. An examination of that case will show it to be one appealing very strongly to the court for protection. It seemed to require immediate action. If the damage apprehended did ensue, the injury was irreparable. And yet it was with apparent great reluctance that a partial injunction was granted, until the question of nuisance should be tried at the next assizes.

Sampson v. Smith, 8 Sim. 272, was a case where the bill complained of a manufactory in which the defendants carried on

the business of engineers. The complaint was as to the unlawful manner in which the business was prosecuted; that the top of the brick-work of the chimney was not as high as the roofs of the adjoining houses; that the body of smoke which issued from the chimney was very great, and that the blacks and soot mingled therewith descended in such dense bodies into the street that the shop and house of the complainant were filled therewith, and his goods and furniture very much injured, and the health and comfort of his family prejudiced and impaired thereby. There was a demurrer, generally, to the bill, and also *ore tenus*, for want of parties. The vice-chancellor decided that the bill was maintainable, and overruled the demurrer. He also decided that the attorney general was not a necessary party, but that an individual who sustains a special damage from a nuisance may file a bill without the attorney general. It does not appear that any application was made for a preliminary injunction.

In the case of *Catlin v. Valentine*, 9 Paige, 575 [38 Am. Dec. 567], an injunction issued to prevent the defendant from erecting a slaughter-house in a thickly settled portion of the city of New York.

The chancellor put it upon the ground that the occupation of a building in a city as a slaughter-house is *prima facie* a nuisance to the neighboring inhabitants. And the case in Georgia, of *Coker v. Birge*, reported in 9 Ga. 425 [54 Am. Dec. 347], and in 10 Id. 336, declares that a livery-stable in a city erected within sixty-five feet of a hotel is *prima facie* a nuisance, and may be restrained by injunction. The reasoning of the court in the latter case seems to be this: the complainant alleged in his bill that if the defendant should be permitted to complete the stable, and appropriate it to the purpose designed and intended, the injury to the complainant and his family, as well as to his property, would be irreparable; that it would result in the loss of health and comfort to his family, of patronage to his hotel, and in a ruinous depreciation of the value of his property, in consequence of the unhealthy effluvia that would arise from the stable, the collection of swarms of flies, and the interminable stamping of horses therein. The court say that the statement of facts contained in the bill must, for the purpose of obtaining the injunction, be considered as true. They assume as facts the mere opinion of the complainant as to the irreparable injury, to wit, that it will result in the loss of health and comfort to the complainant and his family, in the loss of

patronage to his hotel, and in a ruinous depreciation to the value of his property, in consequence of the effluvia that will arise from the stable, the collection of swarms of flies, and the interminable stamping of horses therein. If the allegations of the bill are to be taken as true, then the nuisance is established, and there is no necessity of a trial at law to establish the fact. The injury being irreparable, the propriety of the injunction cannot be questioned. But I do not think the authorities support such a position. The principle upon which the court acts, to be collected from the cases, is this: if the nuisance is admitted, or if the erection contemplated must, from its character, necessarily be a nuisance to the complainant, and his legal remedy is not adequate, the court will enjoin it. A livery-stable, if properly kept, is not *prima facie* a nuisance to neighboring dwellings. In *Coker v. Birge*, 9 Ga. 425 [54 Am. Dec. 347], the court says: "But to do this [that is, keep the stable in such a way as that it will not be a nuisance] requires extreme vigilance on the part of the proprietor. The leaves and manure are to be removed, and the stalls sprinkled with lime-water daily. Will this be done? What security has the complainant that this extraordinary care will be bestowed?" But was not the defendant entitled to the benefit of the presumption that he would conduct his business in a lawful manner? Is it right for this court to interrupt a man in carrying on a lawful trade, upon the assumption that he will conduct it in such a manner as to render it a nuisance to his neighbors?

The business which these defendants propose establishing is a lawful one. Just such a manufacturing establishment as they propose erecting exists in numbers in all our large towns where manufactories exist to any extent. They exist in the very center of our cities and villages, with dwelling-houses all around them; and there is no instance, to my knowledge, where they have been held to be nuisances. They are not considered in our community, and I do not, therefore, feel myself at liberty to declare this one to be, *prima facie* a nuisance. In what respect do the complainants allege that the contemplated manufactory will prove a nuisance? They allege that it will destroy the comfort and quiet of the complainant Wolcott's family, and make his dwelling-house and premises unpleasant, uncomfortable, and unsafe, by means of the noise necessarily attending the working of such a steam-engine and machinery, the increased liability to fire therefrom, and other matters necessarily and usually connected with such establishments, and his family will be compelled to

live in great discomfort and in a continual state of apprehension and alarm. And the other complainants allege that they believe that the said engine and machinery, by the noise made in working the same, and by the smoke and cinders therefrom, and increased liability to fire in and about the same, and other matters connected therewith, will be a nuisance to them and their dwellings, and will greatly and permanently depreciate the value of their said dwelling-houses and premises. It is the noise, then, and smoke and cinders, and danger from fire, that will make this manufactory a nuisance to the complainants. Is the court to assume that the ordinary running of a twenty horse-power steam-engine, driving lathes and planing-machines, will be such an annoyance to the neighborhood as to justify the court in enjoining the carrying on such a business in the neighborhood of half a dozen dwellings? I think not. As to the smoke and cinders—if the steam-engine is driven in such a way as to throw them into and upon the dwellings, so as to annoy their inmates—against such annoyance this court will protect the complainants. But the court will not assume that such consequences are to follow. They are not the necessary results of driving such a power. And as to the danger from fire, experience proves that the apprehensions of the complainants are not well founded in this particular.

The location which the defendants have selected does not manifest a disposition, on their part, to annoy the complainants or to injure their property. There are several acres of vacant land in the tract they have selected, and but a few dwelling-houses in the immediate vicinity. The site is a very advantageous one for their business. The vicinity of the railroads and canal, and their depots, is much more suitable for manufacturing establishments than for dwelling-houses. It is not very likely that dwelling-houses of the first class will be erected any nearer the depots than the proposed building of the defendants. If the court declares that no such manufacturing establishments as the defendants propose shall be erected on this tract, then the land between this location and the canal will probably be occupied by small tenements or work-shops of an inferior kind. This court may, by its action, do a great injury to trade, and lessen the value of other property, which is as much to be regarded as the complainants'. Should the consideration, that some fifteen years ago these "six cottages" were erected on State street, and three years ago a small tenement on this tract of land, prevent that land which lies adjacent to the canal and railroad, and from

its position so well adapted for manufactories, from being occupied by all factories driven by steam-engines? It appears to me that the noise of this twenty horse-power steam-engine, its smoke and cinders, will not add much to the same annoyances which now exist from the bells and steam-whistles, smoke and cinders, proceeding from machinery used on the railroads and canal.

I am of the opinion that the injunction should be dissolved, with costs.

WHAT CONSTITUTES NUISANCE: *Callin v. Valentine*, 38 Am. Dec. 567; *Coker v. Birge*, 54 Id. 347, and note 351.

WHEN INJUNCTION AGAINST NUISANCE WILL BE GRANTED: *Rosser v. Randolph*, 31 Am. Dec. 712, and note 715; *Bigelow v. Hartford Bridge Co.*, 36 Id. 502, and collected cases in note thereto 510; *Beverly v. Burke*, 54 Id. 351; *Walker v. Shepardon*, 60 Id. 423, and note to same 426; *Stiles v. Laird*, 63 Id. 110, and notes 113.

LAWFUL TRADES AS NUISANCES: *Callin v. Valentine*, 38 Am. Dec. 567; *Fish v. Dodge*, 47 Id. 254; *Dargan v. Waddill*, 49 Id. 421; *Coker v. Birge*, 54 Id. 347, and notes to same 351.

POWDER-MAGAZINES AS NUISANCES: *Myers v. Malcolm*, 41 Am. Dec. 744; note to *Hay v. Cohens Co.*, 51 Id. 283; *Cheatham v. Shearon*, 55 Id. 734.

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1. LAW WILL NOT ENFORCE CLAIMS MADE IN CONTRAVENTION OF ITS MANDATES, nor protect property which is held and is being used in deliberate violation of its enactments. *Lord v. Chadbourne*, 290.
 2. MAINE ACT OF 1851, C. 211, SEC. 16, DENIES RIGHT TO MAINTAIN ANY ACTION of which spirituous liquors may be regarded in any manner as the subject-matter. *Id.*
 3. NO ACTION CAN BE MAINTAINED FOR VALUE OF LIQUORS held in violation of, and for the purpose of violating, the Maine act of 1851. *Id.*
 4. NO CIVIL ACTION LIES FOR INJURY CAUSED BY PERJURY, except in cases in which it is expressly given by statute. *Parker v. Huntington*, 455.
- See EJECTMENT; EMINENT DOMAIN, 6, 7; EXECUTORS AND ADMINISTRATORS, 1-3; NEGOTIABLE INSTRUMENTS, 23, 24; TROVER.

AGENCY.

1. AGENT IS PRESUMED TO HAVE DONE HIS DUTY until contrary appears; and misconduct and negligence will not be presumed in the absence of proof thereof. *Gaither v. Myrick*, 316.
2. AGENT CANNOT BE HELD LIABLE FOR NOT ANTICIPATING DANGER ALTOGETHER OUT OF ORDINARY COURSE OF BUSINESS, or of natural events, although he may properly be held responsible for a neglect to provide against risks or perils to which property intrusted to his care may in the ordinary course of business be exposed. *Johnson v. Martin*, 193.
3. PRINCIPAL IS NOT LIABLE ON BILL OF EXCHANGE DRAWN BY AGENT IN HIS OWN NAME, although it contains a direction to the drawee to charge the amount to the account of the principal. *Bank of British N. A. v. Hooper*, 390.
4. BANK DISCOUNTING BILL DRAWN BY AGENT IN HIS OWN NAME, against a firm of which the principal was a member, and accepted by the firm in favor of another, by whom it was indorsed, cannot sustain a claim against the estate in insolvency of the principal individually, on account of an original indebtedness, independent of the bill, although the proceeds were applied to his use. *Id.*

See FACTORS; SUPERCARGOES.

ALIENS.

1. FOREIGN SOVEREIGN MAY SUE IN COURTS OF MISSOURI. *King of Prussia v. Kuepper's Adm'r*, 639.
2. WHERE SUBJECT OF PRUSSIA BECOMES INDEBTED TO HIS SOVEREIGN, by the laws of that kingdom he may be made to answer for such indebtedness in the courts of Missouri. *Id.*

ANIMALS.

1. RULE OF COMMON LAW THAT OWNER OF CATTLE IS BOUND TO KEEP THEM WITHIN INCLOSURE is not applicable to the condition and circumstances of the people of Mississippi, and is not in force in that state. *Vicksburg & Jackson R. R. Co. v. Patton*, 552.
2. IN MISSISSIPPI, OWNER OF CATTLE MAY PERMIT THEM TO GO AT LARGE in the neighboring range, and is not liable as a trespasser for the damage done by them to the premises of his neighbor, which are not inclosed by a lawful fence. *Id.*
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ARBITRATION AND AWARD.

1. COMMON-LAW RIGHT TO SUBMIT, BY PAROL, MATTERS IN CONTROVERSY between parties to arbitration has not been taken away by the provisions of the Iowa code governing those awards which are designed to be reported to the court for judgment and execution. *Conger v. Dean*, 93.
2. SUBMISSION TO ARBITRATION MUST BE MADE IN MANNER REQUIRED BY LAW if the parties wish to ask the aid of the court to enforce the award. But if they do not wish to ask such aid, they may, without complying with the regulations of the code, make a submission by which they will be bound. *Id.*
3. SUBMISSION TO ARBITRATION IN MANNER DIFFERENT FROM THAT REQUIRED BY CODE may be regarded as the means mutually adopted by the parties for an amicable settlement of their difficulties, and should have the force and effect of a settlement made by the parties themselves. In such a case, if there is a failure to comply with the agreement to submit or with the terms of the award, the remedy is by action either on the agreement or award. And the award may be set up as a defense to an action prosecuted for the matter therein settled. *Id.*
4. AWARD OF ARBITRATORS MAY BE AVOIDED by proof that it was made without notice to one of the parties to the submission, or that the agreement to submit was fraudulently obtained. *Id.*
5. ARBITRATORS EXAMINING WITNESSES IN ABSENCE OF PARTY will justify him in abandoning the reference and demanding a rescission; but if he continues to take part in the proceeding after the fact comes to his knowledge, it is a waiver of the irregularity. *Small v. Trickey*, 255.

See REFEREE.

ASSIGNMENTS.

1. NOTICE OF ASSIGNMENT OF NON-NEGOTIABLE INSTRUMENT MUST BE GIVEN, in order to render the assignment valid. *Merchants' etc. Bank v. Hewitt*, 49.
2. DEBTOR WHO IN GOOD FAITH PAYS DEBT BEFORE NOTICE OF ASSIGNMENT THEREOF is not liable to pay it over again to his creditor's assignee. *Dodd v. Brott*, 541.
3. DEED OF ASSIGNMENT TRANSFERRING "ALL PROPERTY OF EVERY DESCRIPTION, REAL, PERSONAL, MIXED, OR CHoses IN ACTION, in whose-soever hands the same may be found," is sufficient to pass reclaimable dividends, and vests them in the trustee for the benefit of the *census que trust*. *Lexington Life etc. Ins. Co. v. Page*, 165.

See BAILMENTS.

ATTACHMENT.

1. IN ACTION NOT FOUNDED ON CONTRACT, PLAINTIFF IS NOT ENTITLED TO ATTACHMENT on the ground that the defendant has property, goods, money, lands, and tenements, or choses in action, not exempt from execution, which he refuses to give either in payment or security of the debt. *Raver v. Webster*, 96.
2. IN ACTION ON ATTACHMENT BOND, RECORD AND PROCEEDINGS IN ORIGINAL CASE are competent evidence for the plaintiff. *Id.*
3. WHERE PETITION CHARGES THAT PLAINTIFF IN ATTACHMENT ACTED WILLFULLY WRONG in suing out the writ, and seeks to recover exemplary damages, the true issue is whether or not such plaintiff, when he made his affidavit for the writ, had, as a reasonable, prudent, and cautious man, good reason to believe, and did believe, what he stated therein as true. And evidence tending to show that he had reasonable grounds to believe what he stated in such affidavit is admissible. *Id.*
4. WORD "WRONGFULLY," AS USED IN SECTION 1854, IOWA CODE, MEANS unjustly, injuriously, tortiously, in violation of law. *Id.*
5. TO MAKE ACT OF CREDITOR, IN SUING OUT ATTACHMENT, WILLFULLY WRONG, and entitle the debtor to exemplary damages, it is not enough to show that the attachment was wrongfully sued out, but it must further appear that the creditor procured the attachment without any reasonable ground to believe the truth of the matters stated in the affidavit, and with the intention, design, or set purpose of injuring the debtor. *Id.*
6. JUDGMENT FOR DEFENDANT IN ATTACHMENT SUIT IS SUFFICIENT EVIDENCE that there was, in fact, no ground for the institution of the suit; but it is not, in an action on the attachment bond, conclusive evidence that the plaintiff in the attachment acted willfully wrong in suing out the writ, and that he had no reasonable grounds to believe what he stated in his affidavit as true. *Id.*
7. ATTACHING CREDITOR IS NOT ENTITLED TO INJUNCTION, on the ground of fraud, restraining the disposition of his debtor's property in the sheriff's hands under judgments and executions. *Martin v. Michael*, 656.
8. OFFICER ATTACHING TRUNK IS NOT LIABLE FOR INTERMEDDLING WITH ITS CONTENTS, which are exempt from attachment, if he does it to no greater extent than merely to remove them from the trunk, and deliver them to the owner, or upon the owner's declining to receive them when offered.

- to keep them safely-until called for. *Per Sawyer, J. Towns v. Pratt, 728.*
8. TRUNK, CABINET-BOX, AND BREASTPIN ARE NOT EXEMPT FROM ATTACHMENT as household furniture and wearing apparel necessary for the debtor and his family, under the New Hampshire statute. *Id.*
20. GARNISHMENT IS BOUND TO ANSWER as to his indebtedness to the defendant named in the process, and such answer cannot, therefore, be regarded as merely voluntary. *Dodd v. Brett, 541.*

ATTORNEY AND CLIENT.

1. ATTORNEY HAS NO LIEN UPON JUDGMENT FOR HIS COSTS, without notice of his claim therefor to the judgment debtor. *Dodd v. Brett, 541.*
2. ASSIGNMENT BY JUDGMENT CREDITOR OF JUDGMENT TO ATTORNEY merges any statute lien for costs which the attorney may have had thereon. *Id.*

BAILEMENTS.

1. BAILEE HAS NO ASSIGNABLE INTEREST WHERE BAILMENT MAY BE TERMINATED AT WILL of either party, or where a personal confidence is reposed in the bailee. *Bailey v. Colby, 752.*
2. BAILEE MAY BY CONTRACT HAVE ASSIGNABLE INTEREST IN BAILMENT where there is no personal confidence reposed in him and the holding is for a term; but such assignment will transfer the bailee's interest only, and the assignee will hold the property in the same manner as did the vendor. *Id.*
3. PLEDGEE, PAWNER, OR OTHER BAILEE HAVING LIEN ON PROPERTY BAILED MAY HAVE ASSIGNABLE INTEREST therein to the extent of his own debt, but not beyond such amount. *Id.*
4. BAILMENT FOR HIRE FOR TERM IS ENDED BY ABSOLUTE SALE BY BAILEE of the property bailed before the expiration of the term, though such sale pass no title, and the owner may maintain trover therefor if the vendee refuses to make delivery on demand; and the rule is the same though the bailee had a right to purchase the article within the term by paying the price thereof. *Id.*
5. BAILEE OF STEERS UNDER SALE TO HIM ON CONDITION that they were to remain the bailor's (vendor's) property until paid for by the former may, before payment, transfer them to another, subject to the bailor's claim, and the transferee will acquire the same rights as his transferor had, and on tender of the price will become owner of the property. *Id.*
6. ONE WHO DEPOSITS MONEY WITH ANOTHER TO BE APPLIED TO THIRD PERSON'S BENEFIT MAY COUNTERMAND APPROPRIATION at any time before it has been applied to that purpose, or before such an engagement has been entered into between the depository and the one for whose benefit the money was originally deposited as creates a privity between them, and amounts to an appropriation. *Winkley v. Foye, 715.*

BANKRUPTCY AND INSOLVENCY.

1. DEBTOR'S PROMISE TO PAY DEBT DISCHARGED IN BANKRUPTCY WAIVES DEFENSE OF DISCHARGE, and restores the debt to its condition of a valid legal obligation. *Badger v. Gilmore, 729.*

2. PROMISSORY NOTE MAY BE INDORSED AFTER DISCHARGE IN BANKRUPTCY, and is revived *pro tanto* by a promise to the indorsee to pay a part of the note, so as to give a subsequent indorsee a right of action thereon. *Id.*

BANKS AND BANKING.

See AGENCY, 4; NEGOTIABLE INSTRUMENTS, 5.

BONDS.

See ATTACHMENT, 2, 6.

BOUNDARIES.

1. PARTY BUILDING ON HIS OWN LAND AND THEREBY USING WALL OF ANOTHER is not liable to the owner for one half the cost of the wall. *Abrams v. Krautler*, 688.
2. IF PARTY'S WALL IS USED BY ANOTHER TO OWNER'S INJURY, his remedy is an action for damages resulting from such injury. *Id.*

See DEEDS, 6-9.

COMMON CARRIERS.

1. BURDEN OF PROOF WHERE PERSON, NOT PASSENGER, IS INJURED BY PASSENGER CARRIER is upon such person to show that he exercised due care, and that the carrier was guilty of negligence, which was the cause of the injury. *Lucas v. New Bedford etc. R. R. Co.*, 406.
2. PASSENGER CARRIER NEED EXERCISE ONLY ORDINARY CARE TOWARD ONE WHO ENTERS CARS NOT AS PASSENGER, but to assist an aged and infirm relative to a seat, and is not bound to give such person any special notice of the time of the departure of the train. *Id.*
3. ONE ENTERING CARS OF PASSENGER CARRIER, NOT AS PASSENGER, but to accompany infirm relative to a seat as a passenger, cannot recover for injuries received in leaving the cars, if he attempted to leave the cars after the train was started, or finding the cars in motion as he was going out, persisted in making progress to get out, and if such attempt was the cause of or contributed to the accident, even though there was negligence in the carrier in moving the train and in a jerk occurring after the starting, which concurred in producing the injury. *Id.*
4. DUTY IMPOSED UPON COMMON CARRIER TO STOP AT ANY PARTICULAR STATION, after having advertised to do so, was imposed upon him as a common carrier, and did not proceed from a special contract to transport any particular passenger. *Heirn v. McCaughan*, 583.
5. WHERE COMMON CARRIER ADVERTISES TO STOP AT CERTAIN STATION, AND TAKE UP PASSENGERS, AND NEGLECTS TO DO SO, the courts are inclined to consider an action against him for his neglect as founded in tort, unless a special contract is very clearly shown by the declaration. The action must be regarded as in the nature of an action on the case for the violation of the duty of the carrier, arising from his engagement to the public. The character of the action must be determined by the nature of the grievance, rather than by the form of the declaration. *Id.*
6. WHEN COMMON CARRIER ADVERTISES TO STOP AT CERTAIN STATION AND TAKE UP PASSENGERS, he is bound by the rules of the common law to perform his undertaking, and no consideration other than the general

legal obligation resting upon him from the nature of his business need be shown by one who has been injured by his acts. Unless good and sufficient reason be shown, any individual injured by a violation of his obligations may maintain an action for the injury. *Id.*

7. **OBLIGATION OF CARRIER TO STOP AT STATION FOR PASSENGERS—EVIDENCE TO EXPLAIN LETTER INCURRING SUCH OBLIGATION.**—A line of steamers conveyed the mails and passengers between two points. They occasionally stopped at intermediate stations, first giving notice of their intention so to do. The question was, whether the company were under a legal obligation to stop at a certain station at a specified time, and take on passengers. It was shown that the company wrote a letter to the postmaster at this station, telling him to have a mail ready at this time, as they were going to stop one of their boats there to receive the same. They also directed him in this letter "to advise all who might feel interested," of this fact. He posted the letter in a conspicuous place. *Held*, that the request above quoted extended to persons desiring to take passage upon the boat, as well as those interested in the mail, and that it was proper to introduce evidence outside of the letter for the purpose of showing this fact. It was proper to consider not only the letter making the appointment, but the circumstances under which it was written, and the business in which the company was engaged. *Id.*
8. **IT IS NO EXCUSE ON PART OF CARRIER OF MAILS AND PASSENGERS, WHO HAS FAILED TO KEEP HIS OBLIGATION** to stop for passengers at a certain time and point, to say that had he done so he would have been unable to perform his contract to deliver the mails on time. *Id.*
9. **JURY MAY IN THEIR DISCRETION AWARD EXEMPLARY DAMAGES AGAINST COMMON CARRIER** in an action founded upon tort against him, in neglecting to keep his obligation to stop at a certain station at a certain time, whereby plaintiff was deceived and injured. *Id.*
10. **IN ACTION FOR GENERAL DAMAGES ARISING DIRECTLY FROM GRIEVANCE COMPLAINED OF**, and as the necessary effect of the wrong, the law presumes damages to have accrued from the wrong, and it is not necessary to state the particular circumstances of aggravation in the declaration. Consequently, in an action against a common carrier for a violation of his duty in not stopping at a station for passengers, plaintiff, who was injured thereby, may show in aggravation of his damage the delicate state of his health, whereby the wrongful act of the defendant operated with peculiar distress upon him, without alleging it in his declaration. *Id.*
11. **DAMAGES TO GOODS ON ANY PART OF LINE OF TRANSPORTATION**, which is composed of the line of several carriers, who, by their common agent, agree to transport the goods over the whole line at a specified freightage, which is to be divided among the several carriers in stipulated proportions, may be set off in an action by one carrier for the whole freightage. *Fitchburg R. R. Co. v. Hanna*, 427.
12. **COMMON CARRIER'S RESPONSIBILITY, AS SUCH, COMMENCES AS SOON AS GOODS ARE DELIVERED TO** and accepted by him for the purpose of transportation, though not immediately laden upon the vessel, car, or carriage, in the absence of stipulations restricting his liability in this respect. *Id.*
13. **ONE WHO, HAVING CONTRACTED TO CARRY GOODS TO CERTAIN PLACE, CONVEYS PART** of them to his own use on the way, may, in an action against the owner of the goods, recover the whole of the freight stipulated

to be paid, if the defendant does not claim any deduction for the goods not delivered. *Hill v. Leadbetter*, 305.

14. CARRIER CANNOT ACQUIRE LIEN ON PROPERTY OF UNITED STATES GOVERNMENT for his services in transporting such property. *Dufelt v. Gorman*, 543.
15. COMMON CARRIER HAS LIEN UPON GOODS TRANSPORTED by him, and a right to retain the possession of them, as against the general owner, until his reasonable charges are paid. *Ames v. Palmer*, 271.
16. SAME CONSEQUENCES ATTACH TO LIEN OF COMMON CARRIERS as to that of a factor. *Id.*
17. COMMON CARRIER'S LIEN DOES NOT DEPRIVE OWNER OF GOODS OF RIGHT to their immediate possession as against a wrong doer. *Id.*

COMMON LAW.

COMMON LAW OF ENGLAND IS LAW OF MISSISSIPPI ONLY SO FAR as it is adapted to our institutions and the circumstances of the people, and is not repealed by statutes, or varied by usages which by long custom have superseded it. *Vicksburg & Jackson R. R. Co. v. Patton*, 552.

CONSTITUTIONAL LAW.

LEGISLATURE MAY PASS LAWS ALTERING, OR EVEN TAKING AWAY, REMEDIES for the recovery of debts, or for the recovery of compensation in damages for torts, without incurring a violation of the provisions of the constitution which forbid the passage of *ex post facto* laws. *Lord v. Chadbourne*, 290.

See EMINENT DOMAIN; EX POST FACTO LAWS; RETROSPECTIVE LAWS; STATUTES.

CONTRACTS.

1. CONTRACT IS GOVERNED BY LAW OF STATE WHERE MADE, WHEN ALL OF PARTIES to it reside in and it was intended to have effect in that state. *Spears v. Shropshire*, 206.
2. IN CONSTRUING CONTRACTS, SUBJECT-MATTER AND INTENTION OF PARTIES, as well as other facts and circumstances, may be inquired into, though the words are to be taken as proved exclusively by the writing. *Foley v. McKeegan*, 107.
3. PAROL EVIDENCE IS NOT ADMISSIBLE TO CONTRADICT OR VARY TERMS of a written instrument, but this rule is directed only against the admission of any other evidence of the language employed by the parties in making the contract. The writing may be read in the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties. *Emery v. Webster*, 274.
4. MEANING OF WORDS AND TERMS OF CONTRACT IS TO BE DETERMINED, in the absence of fraud, by their known or proved signification, and not by the declarations of the parties at the time the contract was made. *Pillsbury v. Locke*, 711.
5. MEANING OF TERM "SHIP TIMBER," as used in a contract by which the defendant was to take all the white-oak upon the plaintiffs' lot that was suitable therefor, cannot be shown by declarations of the defendant, at the time of making the contract, that the vessel for which he designed

the timber was a small-sized one, and that he wanted the small timber upon the lot to put into the top of the vessel. *Id.*

6. MONEY IS NATURAL STANDARD OF VALUE, and when the sum in a contract to be paid by one party to the other is expressed in dollars and cents, it should not be rejected for a more uncertain standard. *Heywood v. Heywood*, 277.
7. NO WORD IN CONTRACT IS TO BE TREATED AS REDUNDANT if any meaning reasonable and consistent with other parts can be given to it. *Id.*
8. CONTRACT TO PAY CERTAIN SUM IN SPECIFIC ARTICLES at an agreed price is for the benefit of the debtor, who has the election to pay in that manner or in money at the time agreed upon, and a tender made by him at the exact time of payment, in lawful money, is a bar to an action on the contract. *Id.*
9. WHERE LESSOR AGREES TO PAY FORTY DOLLARS A YEAR IN SPECIFIC ARTICLES at an agreed price as rent for premises, if he tenders the articles at the time agreed upon the lessor is bound to take them at the stipulated price; but if the lessee fails altogether to deliver the articles, the standard of the damages to the lessor is the forty dollars agreed upon by them in the contract. *Id.*
10. POLICE OFFICER CANNOT STIPULATE FOR EXTRA COMPENSATION nor take reward for services rendered within the duties of his office, and for which he receives a stated salary. *Kick v. Merry*, 658.
11. FOREIGN CONTRACT AGAINST PUBLIC POLICY OF MASSACHUSETTS WILL NOT THERE BE ENFORCED, even if it was valid where it was made. Sale of service, amounting to a form of slavery, comes within the rule; and no comity requires it to be enforced, or will suffer it to be executed. *Parsons v. Trask*, 502.
12. CONTRACT FOR SERVICE MUST BE CERTAIN AND DEFINITE as to the nature and extent of service to be performed, the place where and the person to whom it is to be rendered, and the compensation to be paid, or it will not be enforced. *Id.*

See CORPORATIONS, 14, 17, 18; DAMAGES, 10-19; STATUTE OF FRAUDS.

CONVERSION.

See Co-TENANCY, 9.

CORPORATIONS.

1. COURT OF CHANCERY HAS NO PECULIAR JURISDICTION OVER CORPORATIONS, to restrain them in the exercise of their powers, to control their action, or to prevent them from violating their charter, in cases where there is no fraud or breach of trust alleged as the foundation of the claim for equitable relief. *Treadwell v. Salisbury Mfg. Co.*, 490.
2. RIGHTS AND DUTIES OF CORPORATIONS ARE REGULATED BY COMMON LAW, which in most cases furnishes ample remedies for any excess or abuse of corporate powers and privileges which may injuriously affect either public or private rights. *Id.*
3. BILL IN EQUITY CAN BE MAINTAINED AGAINST CORPORATION ONLY WHEN there is no plain and adequate remedy at law, and a case is presented which entitles a party to equitable relief, under some general head of chancery jurisdiction. This rule applies to stockholders as well as to other persons. *Id.*

6. **RIGHTS AND REMEDIES OF STOCKHOLDERS AGAINST CORPORATIONS ARE NOT DEPENDENT ON CAPACITY** in which they own shares in the corporate stock. All stand on a perfect equality as to rights and remedies. One who holds shares as trustee is on the same plane as one who holds them in his own right. *Id.*
6. **SIGNING OF NOTICE OF OPENING OF BOOKS OF SUBSCRIPTION TO STOCK** by a majority only of the persons appointed by the charter to superintend the organization of the corporation, where the charter provides simply that the books shall be opened under the directions of the persons named, is sufficient, and affords no defense to an action on subscription. *Penobscot R. R. Co. v. White*, 257.
6. **CONTRACT OF SUBSCRIPTION TO CORPORATE STOCK IS COMPLETE** as soon as the corporation is organized, and has proceeded regularly to ascertain who are its corporators. *Id.*
7. **RECORD OF CORPORATION SHOWING REQUISITE NUMBER OF SHARES SUBSCRIBED** to authorize its organization, together with the names of the subscribers, etc., to have been duly ascertained and reported by a committee, which report was duly accepted, is sufficient evidence of due organization, in an action upon a subscription to stock, there being no proof to the contrary. *Id.*
8. **REQUIREMENT OF CHARTER THAT CERTAIN PER CENT OF COST SHALL BE SUBSCRIBED** before a railway company shall commence the construction of any section of its road does not affect the organization of the company, and non-compliance therewith will not defeat an action to recover stock assessments against a subscriber. *Id.*
9. **STOCK ASSESSMENT IS NOT INVALIDATED BY ABSENCE OR ILLEGALITY OF DEBTS** of the corporation, where the assessment was made for a lawful purpose. *Id.*
10. **STOCK SUBSCRIPTION IS NOT INVALIDATED BY IRRESPONSIBILITY OF OTHER SUBSCRIBERS** for shares necessary to be subscribed before the organization of the corporation, if such other subscriptions were made and accepted by the company in good faith, the subscribers being apparently responsible, and evidence of their irresponsibility is no defense to an action on a subscription of another shareholder. *Id.*
11. **DECLARATIONS OF SUBSCRIBER TO CORPORATE STOCK, SHOWING HIS SUBSCRIPTION FRAUDULENT** and not accepted in good faith, made long after the organization of the corporation, are not admissible to show that the corporation was not duly organized, in an action on another stock subscription. *Id.*
12. **EVIDENCE OF CIRCUMSTANCES OF STOCK SUBSCRIBER'S ATTENDANCE AT MEETING** of directors, at which certain assessments were made, and of his signing the call therefor, is immaterial, in an action to recover assessments, such meeting having taken place long after the organization of the corporation, and after its right to make assessments had been perfected. *Id.*
13. **WHERE CAPITAL OF CORPORATION CONSISTS IN AMOUNT PAID FOR STOCK** therein by the shareholders, any money advanced by them beyond what is due on their stock becomes a debt against the corporation. *Lexington Life etc. Ins. etc. Co. v. Page*, 165.
14. **SHAREHOLDERS HAVE AS MUCH RIGHT TO CONTRACT WITH CORPORATION** as if they were strangers. *Id.*

15. **SHAREHOLDER WHO IS CREDITOR OF CORPORATION** may be preferred in an assignment made by it, and no inference of a fraudulent intent can be deduced therefrom. *Id.*
16. **DIVIDENDS DECLARED FROM PROFITS** on premiums on unexpired risks are subject to reclamation by the corporation. *Id.*
17. **CORPORATIONS MAY MAKE ALL CONTRACTS THAT ARE NECESSARY AND USEFUL** to enable them to carry on the business or accomplish the objects of their incorporation. *Old Colony R. R. Corp. v. Evans*, 394.
18. **RAILROAD CORPORATION MAY PURCHASE AND CONTRACT TO SELL LAND** bought by it, so that gravel may be dug therefrom and carried over its road at an agreed freight, to be delivered to and used by a third person. *Id.*
19. **RAILROAD COMPANY MAY SUE IN ITS OWN NAME** on a written order to deliver stock to "D. A. N., president of the Eastern Railroad Company." *Eastern Railroad Co. v. Benedict*, 384.
20. **CORPORATION MAY SELL ITS ASSETS TO NEW CORPORATION** and take the stock of the latter in payment, with the assent of the majority of the stockholders of the old corporation. *Treadwell v. Salisbury Mfg. Co.*, 490.
21. **STATUTE MERELY PERMITTING CHARTER OF CORPORATION TO BE DIS- SOLVED WITHOUT RESORT TO LEGISLATURE** is not necessarily so restrict- ive as to take away the common-law right of a corporation to sell its property and close up its business: See acts of Mass. 1852, c. 55. *Id.*
22. **RIGHT OF CORPORATIONS TO SELL THEIR PROPERTY IS ABSOLUTE**, at COM- MON LAW, where they act by a majority of their stockholders; and this right is not limited as to objects, circumstances, or quantity. *Id.*
23. **RIGHT OF CORPORATIONS TO WIND UP AND CLOSE BUSINESS.**—Corporations of a private character, established solely for trading and manufacturing purposes, have a right, by a vote of the majority of their stockholders, to wind up their affairs and close their business, where they deem it expedient to do so. Public policy does not require them to go on at a loss. But railway, canal, turnpike, charitable, religious, and other corporations established for objects quasi public are exceptions to the general rule. *Id.*
24. **MUNICIPAL CORPORATION IS NOT LIABLE IN DAMAGES FOR VALUE OF PROPERTY DESTROYED BY FIRE** in consequence of the failure on the part of the city authorities to keep its public cisterns in repair, and to provide its fire-company with hooks, ladders, and other necessary apparatus. *Patch v. City of Covington*, 186.
25. **MUNICIPAL CORPORATION IS NOT LIABLE FOR OFFICERS' UNLAWFUL OR UN- authorized acts**, as a general rule. *Mitchell v. Rockland*, 252.
26. **DECLARATIONS OF ALDERMAN ARE NOT EVIDENCE AGAINST CITY or against** its board of health, when he was not acting in behalf of either. *Id.*
See **EXECUTIONS**, 1, 2; **RAILROADS**; **STATUTE OF LIMITATIONS**, 11.

CO-TENANCY.

1. **SUBSCRIBERS TO ERECT MEETING-HOUSE CONSTITUTE CO-TENANCY, AND NOT PARTNERSHIP**, where they agree to pay the sums severally subscribed, the property of each in the house when erected to be in proportion to his sub- scription, and the whole to be sold on such terms as the majority shall approve; and a subscriber cannot maintain a suit in equity against his associates to adjust their respective liabilities where he has paid more than his share. *Woodward v. Cowing*, 211.

2. DEED CONVEYING TO TWO PARTIES AS TENANTS IN COMMON, certain real estate, cannot as against the purchaser at a sheriff's sale of the interest of one of the co-tenants, under a judgment recovered against him prior to the date of the deed, be shown to have been intended, as between the grantees, to operate as a security by way of mortgage for a loan made to his co-tenant by the one whose interest was so sold. *Campbell v. Lowe*, 239.
3. CO-TENANT IN POSSESSION IS NOT ESTOPPED FROM DENYING TITLE OF HIS CO-TENANTS, where he came into possession through a deed from another co-tenant against whom he had obtained judgment of possession at the time that the deed was made, at which time a writ for delivery of possession was in the hands of an officer. This latter proceeding terminated the co-tenancy; actual execution of the writ was not necessary to effect that object. *Vasquez v. Ewing*, 694.
4. TENANT IN COMMON, WHO HAS OCCUPIED AND TAKEN PROFITS OF JOINT ESTATE, IS NOT LIABLE TO HIS CO-TENANT for a surplus of the former's share, unless the former has received in money more than his share of the rents and profits of the common estate. *Peck v. Carpenter*, 477.
5. ACTION AGAINST TENANT IN COMMON RECEIVING MORE THAN HIS SHARE OF RENTS and profits of the common property could not be maintained at common law, but under the modern authorities in this country such an action may be maintained where the defendant has actually received more than his share of the entire profits after deducting all reasonable charges, and the balance is due to the plaintiff, and not to the other co-tenants, but not otherwise. *Moses v. Ross*, 250.
6. TENANT IN COMMON CANNOT MAINTAIN ACTION AGAINST CO-TENANT, USING the common property, for his share of the value of the use, even under the modern American authorities. *Id.*
7. ACTION UNDER MAINE STATUTE AGAINST CO-TENANT RECEIVING WHOLE RENTS and profits of the property, or more than his share, is not maintainable unless the declaration alleges that the property has actually yielded rents and profits, and that the defendant has taken the same without the plaintiff's consent. *Id.*
8. EVERY TENANT IN COMMON IS ENTITLED TO SEPARATE ENJOYMENT OF HIS INTEREST in the property, either by a partition or by a sale and division of the proceeds, under the Maryland statutes, and though it does not appear that a sale would be for the advantage of the parties, partition may still be had as a matter of right, and it will not be refused on the ground of the difficulties or inconvenience attending it. *Campbell v. Lowe*, 239.
9. ONE TENANT IN COMMON OF PERSONAL PROPERTY HAS NO RIGHT TO SELL the entire property as his own; and if he does, he becomes liable therefor in an action of tort. *Burbank v. Crooker*, 470.
10. SOLE OCCUPATION OF ONE TENANT IN COMMON IS NOT OUSTER OF OTHER, where the latter does not choose to come in and enjoy the estate with his co-tenant, and the latter has no action at law to recover for such sole use and occupation. *Peck v. Carpenter*, 477.
11. AFTER-ACQUIRED TITLE MAY BE SET UP BY PARTY TO DEED OF PARTITION, which recites the relain in fee of the tenants in common, and contains mutual covenants for quiet enjoyment by each of the portion assigned to him. *Doane v. Willcutt*, 309.

12. **PRACTION IN PARTITION SUIT, WHERE COMPLAINANT'S TITLE IS DENIED**, is to retain the bill in the equity court until the title can be tried at law, but if the complainant has shown a legal title, and the defense is one cognizable only in equity, the equity court must entertain and decide the question of title. *Campbell v. Lowe*, 339.
13. **COMPLAINANT IN PARTITION SUIT ON BILL AVERRING** that the land was incapable of division, that defendant refused to divide or unite in a sale, and that it was for the interest and advantage of the parties to have the same sold, and praying for a sale and for general relief, on proof of his title as tenant in common, is entitled either to a decree for a sale or for a partition, according to the evidence; and in such case, a dismissal of the bill because there was no proof that a sale would be advantageous to the parties is erroneous, and the party is entitled to relief under the general prayer, notwithstanding the averment that defendant refused to divide the property was inappropriate, in view of the averment that it did not admit of partition, and the case made by the bill is not vitiated thereby. *Id.*

See EQUITY, 1.

COVENANTS.

1. **NO BREACH OF COVENANT AGAINST INDEMNITIES** occurs from fact that grantor held the land on a condition to erect a house thereon within a certain time. *Estabrook v. Smith*, 445.
2. **TO MAINTAIN ACTION ON COVENANT OF WARRANTY**, plaintiff must show eviction or what is tantamount thereto. *Id.*
3. **EXCEPTION OF MORTGAGE IN COVENANT AGAINST INDEMNITIES** IS NOT EXTENDED TO COVENANT OF WARRANTY, since the two covenants are not connected covenants of the same import, and directed to one and the same object. *Id.*
4. **PAYMENT BY GRANTEE OF MORTGAGE AGAINST WHICH HE COULD NOT MAKE ANY LEGAL DEFENSE**, for the purpose of preventing an actual eviction, entitles him to an action on a covenant of warranty. *Id.*
5. **GRANTEE MAY RECOVER, IN ACTION FOR BREACH OF COVENANT OF WARRANTY**, where he has paid off a mortgage, to prevent actual eviction, the whole amount of the mortgage, and interest thereon, where it was paid before the trial, even though it was paid after he conveyed the estate to another, who undertook to pay the mortgage as part of the consideration of the conveyance. *Id.*
6. **PAROL EVIDENCE THAT GRANTEE WAS TO TAKE CONVEYANCE SUBJECT TO OUTSTANDING MORTGAGE**, or that he paid little or no consideration, is not admissible to control a covenant of warranty in an action for a breach thereof. *Id.*
7. **STATUTORY WORDS "GRANT, BARGAIN, AND SELL," IN DEED, IMPLY COVENANT OF TITLE RUNNING WITH LAND**; and where a defeasible title or possession without any title has passed under such deed, the statutory obligation in respect to the title is one of indemnity, and until damage is sustained by breach of the covenant, inures to the benefit of the party on whom the loss falls. *Dickson & Gantt v. Desires' Adm'r*, 681.
8. **GENERAL PRINCIPLES OF LAW APPLICABLE TO ACTIONS FOR BREACH OF COVENANT OF WARRANTY** or seisin discussed at length. *Id.*

9. **MEASURE OF DAMAGES IN ACTION FOR BREACH OF COVENANT OF WARRANTY OR SEISIN** is the value of the land at the time of the sale, as fixed by the parties to the deed, where the transaction remains between the original parties; but when the original grantee has sold the land to another, and the second purchaser has been evicted, his right of recovery against the first grantor upon the original covenant is limited to the value of the land at the time of his purchase. *Id.*
10. **IN ACTION FOR BREACH OF COVENANT OF TITLE**, it is not necessary for party to show eviction, but he must show an outstanding paramount title which has resulted in some damage to himself, and if he insists that he has extinguished this title, and seeks to recover the cost of it, he must show affirmatively that the price paid was reasonable. *Id.*
See JUDGMENTS, 11, 12; LANDLORD AND TENANT.

CRIMINAL LAW.

1. **STATUTE OF LOUISIANA AGAINST CARRYING CONCEALED WEAPONS** does not contravene the second article of the amendments of the constitution of the United States. The arms there spoken of are such as are borne by a people in war, or at least carried openly. *State v. Smith*, 208.
2. **PARTIAL CONCEALMENT OF WEAPON** is a violation of statute defining as concealed any weapon carried by a person, not appearing in full open view. *Id.*
3. **CONVICTION OF LARCENY IS WARRANTED ON PROOF** that the defendant went into a shop and asked to buy the chattel, but was referred by the clerk to the owner, who refused to sell it to him except upon his father's order, which was not obtained, and thereafter the defendant asked the clerk to be shown the chattel, which he took and carried away, saying to the clerk that he had made it all right with the owner. *Commonwealth v. Wilde*, 350.
4. **IT IS LOTTERY, WITHIN MEANING OF STATUTE** imposing a fine for disposing of any estate, real or personal, by lottery, where a sale of books is made for more than their value, and the purchasers are entitled to gifts or prizes, to be ascertained by a correspondence, unknown to them, between certain numbers placed on the books, and the different articles proposed as gifts or prizes. *State v. Clarke*, 723.
5. **TO CAUSE OR PROCURE ABORTION BEFORE CHILD IS QUICK** is not a criminal offense at common law. *Abrams v. Fiske*, 77.
6. **INFANT IN VENTRE SA MERE IS NOT HUMAN BEING** within the meaning of section 2508 of the Iowa code, which provides that whoever kills any human being with malice aforethought, either express or implied, is guilty of murder. *Id.*
7. **IN TRIAL FOR MURDER, IT IS ERROR FOR JUDGE TO INSTRUCT JURY GENERALLY UPON LAW OF HOMICIDE.** He should charge them only upon contested questions of law applicable to the issue, and at the request of one of the parties, or their counsel, distinctly specifying in writing the point of law in regard to which the instruction is asked. *Williams v. State*, 615.
8. **COMPLAINT IS INSUFFICIENT IF IT CHARGES COMMISSION OF OFFENSE "on the fifteenth day of July, 1855,"** omitting the letters "A. D." *Commonwealth v. McLoon*, 354.

2. COMPLAINT IS INSUFFICIENT IF IT CHARGES COMMISSION OF OFFENSE "on the third day of June instant," without mention of the year, although it purports to be sworn to "on the fourth day of June, A. D. 1855." *Commonwealth v. Hutton*, 352.

See EX POST FACTO LAWS, 1; JURY AND JURORS, 4; RIDE.

DAMAGES.

1. TO SUSTAIN ACTION, DAMAGES TO BE RECOVERED must be the natural and proximate consequence of the act or omission complained of. *Patch v. City of Covington*, 186.
2. WHEN CALAMITY OF ONE PERSON, PRODUCED WITHOUT HIS FAULT or by mere misjudgment or indiscretion in the exercise of a right, causes an injury to the rights of another, the latter can maintain no action except for the unnecessary continuance of the injury, and is limited to a recovery for actual damage produced by that wrong. *Morrison v. Thurman*, 163.
3. DAMAGES ARE COMPENSATION FOR ACTUAL INJURY in actions *ex delicto*, and must be the natural and proximate consequences of the act complained of. *Worcester v. Great Falls Mfg. Co.*, 217.
4. DAMAGES FOR LOSS OF POSSIBLE USE OF REALTY AS MILL PRIVILEGE by the wrongful overflowing of the same, where the plaintiff did not actually intend in good faith to make such use of it, cannot be allowed. *Id.*
5. PLAINTIFF HAVING JOINT INTEREST IN PROPERTY amounting to one half the profits can maintain his action for an injury to it, and recover costs. *Chandler v. Hesland*, 487.
6. IN ACTION FOR DAMAGES WHICH DID NOT NECESSARILY ACCRUE FROM ACT COMPLAINED OF, and consequently are not implied by law, it is necessary that the declaration should state the special damage complained of in order to prevent surprise on the defendant. *Heirn v. McLaughlin*, 568.
7. NO OTHER SUM CAN NOW BE RECOVERED UNDER PENALTY than that which will compensate the plaintiff for his actual loss. *Gower v. Carter*, 71.
8. PROMISE TO PAY PENALTY BEYOND AMOUNT OF LEGAL INTEREST ON money loaned cannot be enforced. *Id.*
9. DAMAGES FOR MERE NON-PAYMENT OF MONEY CAN NEVER BE SO LIQUIDATED between the parties as to evade the provisions of the law which fix the rate of interest. *Id.*
10. WHETHER SUM PROVIDED IN CONTRACT TO BE PAID ON NON-PERFORMANCE shall be considered as a penalty or as liquidated damages, is a question of construction, on which the court may be aided by circumstances extraneous to the writing. *Foley v. McKeegan*, 107.
11. COURTS IN CONSTRUING CONTRACTS TO DETERMINE WHETHER SUM FIXED CONSTITUTES PENALTY OR LIQUIDATED DAMAGES must see whether the agreement contains one or several stipulations; whether such stipulations vary in importance; whether the damages are in their nature certain or uncertain, or difficult of definite ascertainment; or whether, where the injury is certain, the sum fixed upon is proportionable or disproportionate to such injury and the actual claim which grows out of it. *Id.*
12. TERMS APPLIED BY PARTIES TO SUM FIXED ON, TO BE PAID ON NON-PERFORMANCE of contract, will not always determine the action of the court

- in construing the effect of such a provision in a contract; and though the parties call the sum so fixed a "penalty," or give it no name, or style it "liquidated damages," the court, in any and all such cases, will treat the sum as one or the other, depending on the nature of the agreement, intention of the parties, surrounding circumstances, and reason and justice of the case. *Id.*
13. **STIPULATION FOR PAYMENT OF SPECIFIED SUM ON NON-PERFORMANCE OF CONTRACT** will generally be treated as a penalty, rather than as liquidated damages, if the intention of the parties as to the effect of such stipulation appears doubtful. *Id.*
14. **STIPULATIONS IN CONTRACT FOR SALE OF LAND**, that if the purchaser fail to pay the balance of the purchase money he shall forfeit the fifty dollars which he has already paid, or if the vendor shall fail to properly execute deeds to the vendee when the purchase money is paid he shall forfeit the sum of fifty dollars, are construed as creating penalties, and not as fixing the amount of damages. *Id.*
15. **CONTRACT FOR PERFORMANCE OF SEVERAL ACTS, AND FOR PAYMENT OF SPECIFIED SUM on breach of the agreement**, must be construed as creating a penalty. *Id.*
16. **MEASURE OF DAMAGES FOR BREACH OF COVENANTS IN CONTRACT** which contains a stipulation for the payment of a specified sum on breach of the covenants, such sum being construed to be in the nature of a penalty, may be more or less than the amount of such penalty. *Id.*
17. **MEASURE OF DAMAGES AGAINST VENDOR OF REALTY FOR FAILURE TO CONVEY** depends on the cause of the failure to convey: if the vendor was honest, but was prevented, by unforeseen causes beyond his control, from making the conveyance, the plaintiff should recover only nominal damages, or where the vendee has already paid the purchase price, he should recover the sum paid, with interest; but if the vendor is in fault, and should have known that he could not comply with his contract, or having title refuses to convey or disables himself from so doing by sale to a third person, or if he had no title at the time of agreement, or in any other case where the inability to convey might arise from fraud in the covenantor, the purchaser should recover substantial damages, including compensation for actual loss, and for the increase of value of the land. *Id.*
18. **DAMAGES FOR BREACH OF PAROL AGREEMENT FOR SALE OF LAND.**—Defendant agreed, by parol, to sell a piece of land to plaintiff, and to execute the proper written evidence of the bargain. Plaintiff, in faith of the agreement, at considerable expense, went into possession of the land. Defendant, without assigning any reason, refused to comply with his contract and forced plaintiff to abandon his possession. *Held*, that while it is unquestionably true that no action can be maintained either to recover damages for the loss of the land or the bargain, or for a specific performance, yet plaintiff is entitled to recover compensation for his trouble, loss of time, and expense. He may recover damages resulting from the fraudulent conduct of the defendant. *Welch v. Lawson*, 606.
19. **MEASURE OF DAMAGES, IN ACTION AT LAW BY VENDOR FOR BREACH OF CONTRACT OF SALE OF LAND**, is the difference between the contract price and the salable value of the land at the time of the breach. *Old Colony R. R. Corp. v. Evans*, 394.

20. OWNER OF LAND MAKING EXCAVATIONS THEREON IS LIABLE FOR DAMAGE thereby caused to the property of an adjacent owner, if such damage might have been avoided by the exercise of reasonable care in making the excavations. *Charles v. Rankin*, 642.
 21. OWNER OF LAND MAKING EXCAVATIONS THEREON, BY WHICH ADJACENT OWNER'S BUILDING IS INJURED, is not protected by the fact that he used such care as his builder, who was a skillful and careful person, deemed necessary. The question as to his liability for such injury depends upon whether or not he was negligent in the performance of the work. *Id.*
 22. PERSON EXCAVATING ON HIS OWN LAND, BY SIDE OF ANOTHER'S BUILDING, is not bound to use such care and caution to prevent injury to such building as a sensible and prudent man, experienced in such work, would exercise if he were the owner of the building. He is bound to use ordinary care to avoid doing harm to his neighbor's building; but the law does not exact from him the same care and expense for the security of his neighbor's property that he may have found it for his interest to have taken for his own. *Id.*
- See ATTACHMENT, 3, 5; BOUNDARIES, 2; COMMON CARRIERS, 9-11; CONTRACTS, 9; CORPORATIONS, 24; COVENANTS, 9, 10; EMINENT DOMAIN, 6-9; INNS; JUDGMENTS; LIBEL, 8, 9; NEGLIGENCE, 1; NUISANCES, 11; RAILROADS, 9; SUPERCARGOES, 12.

DEBTOR AND CREDITOR.

See ASSIGNMENTS, 2.

DEEDS.

1. WHERE DEED WAS EXECUTED AND ACKNOWLEDGED IN NEW YORK, although the certificate of the county clerk fails to certify that it was executed and acknowledged according to the laws of that state, it is entitled to record in this state, under the law of 1827. Consequently, the record of this deed being admissible in evidence, the original would be also, without preliminary proof. *Lacey v. Davis*, 524.
2. DEED PURPORTING TO BE FOR CONSIDERATION CANNOT BE CONTRADICTIONED by the grantor by evidence that there was no consideration. *Hammond v. Woodman*, 219.
3. DEED IS EFFECTUAL WITHOUT CONSIDERATION between the parties to it. *Id.*
4. PARTIES TO DEED CANNOT, IN CONTROVERSY WITH STRANGERS, maintain that the instrument does not express the intention of the parties. *Campbell v. Lowe*, 339.
5. MISTAKE IN DEED CANNOT BE SHOWN BY PAROL IN DEFENSE TO BILL FOR INJUNCTION to restrain commission in waste, brought by the grantee against the grantor, who reserved to himself a life estate. *Webster v. Webster*, 705.
6. PAROL EVIDENCE IS ADMISSIBLE TO EXPLAIN MEANING OF WORDS "OLD CHANNEL," used in a deed describing the land thereby conveyed as "all that part of lot 87, third division of lots lying westwardly of the center of the old channel of Little river stream." *Emery v. Webster*, 274.
7. EVIDENCE OF LANGUAGE AND ACTS OF PARTIES TO DEED at the time of its execution, and subsequent thereto, is admissible to show how they construed it, and what they then recognized to be the true boundary. *Id.*

8. IDENTICAL MONUMENT REFERRED TO IN DEED MAY ALWAYS BE SHOWN by parol proof. *Id.*
 9. LAND DESCRIBED IN CONTRACT OF SALE AS "CERTAIN TRACT OF LAND CALLED MOUNT HOPE, containing about forty acres, situated on the southerly side of N. river," may be shown by the acts of the parties to include a tract of seventy acres known to the parties by that name. *Old Colony R. R. Corp. v. Evans*, 394.
 10. IMBECILITY OF GRANTOR not amounting to a total loss of understanding is not sufficient ground to set aside a deed, though it may be a circumstance in determining whether it is fraudulent or not. *Hill v. Nash*, 293.
 11. JURY ARE JUDGES OF MENTAL CAPACITY of grantor, where a deed is sought to be set aside on the ground of incapacity; and where the evidence is conflicting, the court will not set aside their verdict, though it might have come to a different conclusion. *Id.*
 12. CONVEYANCE INCLUDES LAND TO LOW-WATER MARK, where the land is bounded "by the sea or beach." *Doane v. Willcutt*, 369.
 13. RESERVATION IN DEED INCLUDES STANDING TREES, where it is of "all the hemlock, spruce, and birch timber in the wood-lot," especially when it does not appear that there was any manufactured lumber, and the reservation refers for measurement of the trees to the circumference at the stump. *Alcott v. Lakin*, 730.
 14. ADMEASUREMENT OF TREES RESERVED INCLUDES BARK, where the reservation is limited to trees "measuring forty-two inches in circumference at the stump." *Id.*
- See ASSIGNMENTS, 3; CO-TENANCY, 2; COVENANTS; EASEMENTS, 2, 3; INHERIT, 1; STATUTE OF FRAUDS, 9; TRUSTS AND TRUSTEES, 1.

DEPOSIT.

See BAILMENTS, 6.

DOWER.

1. TENANT IN DOWER, TO MAINTAIN BILL IN EQUITY TO REDEEM LAND FROM MORTGAGE made by her husband and herself, must offer to pay the whole amount due on the mortgage. *McCabe v. Bellows*, 467.
2. WIDOW'S DOWER IS BARRED, AS AGAINST MORTGAGEE, and so far as is necessary for the payment of the mortgage debt, where she joined with her husband in the mortgage. *Id.*
3. WIDOW'S DOWER CAN BE ASSIGNED ONLY WHEN MORTGAGE DEBT IS PAID, OR WHERE MORTGAGEE DOES NOT OBJECT, where she joined with her husband in the mortgage security. *Id.*
4. WIDOW IS ENTITLED TO DOWER IN MORTGAGED PREMISES AS AGAINST EVERY PERSON EXCEPT MORTGAGEE and those claiming under him, where she made the mortgage with her husband. *Id.*
5. WIDOW MAY HAVE HER DOWER OF WHOLE ESTATE mortgaged by herself and husband, by repaying her proportion of the amount paid by one claiming under her husband, and who has redeemed; or she may have her dower according to the value of the estate, after deducting the amount paid for the redemption. *Id.*
6. DOWER.—A husband secretly executed a deed to his sons immediately before his marriage; the court conclude from a review of the evidence that

the deed was without consideration, and was not delivered until after the grantor's marriage: *held*, that his widow was entitled to dower in the land, upon two grounds: 1. Because the husband was seized of the land during coverture; 2. Because, had the deed been delivered at its date, its execution was fraudulent as to the widow, being executed secretly for the purpose of cutting off her dower. *Cranston v. Cranston*, 534.

See REVERSIONS.

EASEMENTS.

1. GRANT OR RESERVATION OF EASEMENT IMPLIES AUTHORITY to do everything necessary to secure the enjoyment of it. *Hammond v. Woodman*, 219.
2. RESERVATION IN DEED OF "RIGHT TO TAKE AND USE WATER SUFFICIENT," "at all times," to drive a certain factory on the grantor's land, is as effectual as a conveyance of such right by the grantee to the grantor, especially where the grantee afterwards conveys the whole interest reserved to the grantor, and such right vests in a subsequent grantee of the residue of the grantor's land as an easement or servitude appurtenant; and such subsequent grantee may, when necessary to secure his right to "sufficient" water, cut off any spouts or conduits used by the prior grantee, whereby the quantity is diminished. *Id.*
3. GRANT CANNOT BE IMPLIED OF RIGHT TO TAKE WATER FROM FLUME RESERVED TO GRANTOR on conveyance of part of a tract of land, merely because at the time of the grant a water-pipe was in use to convey water from said flume to mills or machinery on the part granted, where such use was not necessary to the enjoyment of what was granted. *Id.*
4. RIGHT TO AIR AND LIGHT IS NOT ACQUIRED BY PURCHASER OF LOT on which stands a building with a window overlooking an adjacent lot, and placed in the wall close to the dividing line between the two, where the owner of the lots sells them both by auction on the same day, with the privileges and appurtenances belonging to each, and though the sale and conveyance to him respectively precede the sale and conveyance of the other lot. *Collier v. Pierce*, 453.
5. COTERMINOUS OWNER OF LAND HAS NO RIGHT TO INCREASED SUPPORT for lateral pressure increased by the erection of buildings upon his land, unless he has acquired such a servitude by grant or prescription. *Charles v. Rankin*, 642.

See BOUNDARIES; WATERCOURSES, 3, 7.

EJECTMENT.

1. PARTIES CANNOT CLAIM EQUITABLE RELIEF IN ACTION OF EJECTMENT, UNDER PETITION, the allegations of which are only suited to try the legal title. If the parties are entitled to equitable relief, they must seek in a separate proceeding. *Vasquez v. Ewing*, 694.
2. IT IS NOT PLAINTIFF'S DUTY, IN ACTION OF EJECTMENT, to disclose the amount of purchase money paid for his title in order to limit his recovery, without being called upon to do so; and if the defendant does not show this fact, *prima facie*, the plaintiff has a right to recover the consideration in the deed of the vendor proportionate to the land lost. *Hunt v. Orwig*, 144.

See STATUTE OF FRAUDS, 12.

EMINENT DOMAIN.

1. **RIGHT TO PROPERTY IS VESTED RIGHT**, but a right to recover the amount of a judgment is not such right. *Railroad Co. v. Dickerson*, 148.
2. **PARTY CANNOT BE DIVESTED OF VESTED RIGHT, UNDER CONSTITUTION OF KENTUCKY**, until just compensation has been made him therefor, but the legislature has the power to prescribe the mode in which such compensation shall be ascertained and determined. *Id.*
3. **UNDER CONSTITUTION OF KENTUCKY, COMPENSATION SECURED TO OWNER OF LAND** taken for a public use is the actual value to him in money of the land taken, considering its relative position to his other land and other circumstances which may diminish or enhance that value, and this value cannot be diminished by any speculative advantage he may derive from its appropriation to the public use. *Id.*
4. **PROVISION IN STATUTE IS VOID WHICH TENDS TO DEFEAT CLAUSE IN STATE CONSTITUTION** securing to the owner just compensation for any of his property taken for a public use. *Id.*
5. **WHERE OWNER OF PROPERTY WHICH HAS BEEN TAKEN FOR PUBLIC USE CLAIMS MORE THAN ITS VALUE** as consequential damages, the advantages and disadvantages which result to him from such taking may be compared by way of set-off, and if equal, he will not be entitled to such damages. *Id.*
6. **ACTION OF TORT WILL NOT LIE FOR DAMAGES RESULTING** from the reasonably proper and skillful exercise of the right of eminent domain. *Perry v. City of Worcester*, 431.
7. **ACTION OF TORT WILL LIE AGAINST CITY FOR DAMAGES RESULTING FROM IMPROPER AND UNSKILLFUL MANNER** in which a public work is executed in the exercise of the right of eminent domain. *Id.*
8. **CITY IS LIABLE IN TORT FOR DAMAGES** resulting from building in place of an old bridge a new one, with water-ways so narrowed and reduced that in times of freshet the water of the stream is set back upon the plaintiffs' mills, when a suitable bridge might have been built without narrowing the water-ways. *Id.*
9. **ONE IS NOT ESTOPPED FROM RECOVERING IN TORT AGAINST CITY** for damages accruing from the unskillful construction of a public work, because he was a member of the committee of the city council who made the report in favor of the construction and the contract for the work. *Id.*

EQUITY.

1. **EQUITY HAS JURISDICTION OF SUITS BETWEEN PARTNERS, BUT NOT BETWEEN CO-TENANTS**, for the settlement of their affairs, and an association must be shown to be a partnership to give equity jurisdiction of such a suit. *Woodward v. Cowing*, 211.
2. **COURT OF EQUITY WILL DETERMINE ALL NECESSARY QUESTIONS OF LAW AND FACT** in the exercise of its legitimate jurisdiction. *Treadwell v. Salisbury Mfg. Co.*, 490.
3. **COURT OF EQUITY WILL TAKE COGNIZANCE OF COLLATERAL AND INCIDENTAL MATTERS**, though they may not in themselves be the subject of a direct suit in equity, if they arise in the exercise of an acknowledged chancery jurisdiction, and the decision of the cause renders it necessary that they should be considered and determined; but they must be essential to the

principal inquiry and to the relief sought by the bill, or they will be irrelevant and immaterial, and cannot be inquired into. *Id.*

4. DETERMINATION OF IRRELEVANT AND IMMATERIAL MATTERS IN EQUITY cannot form the basis of a decree against parties who have no rights or interests involved in the principal subject-matter which forms the foundation of plaintiffs' case. *Id.*
 5. COURT OF EQUITY WILL NOT DISREGARD AND INVADN RIGHTS OF INNOCENT PARTIES, in order to aid one who has a right to invoke the protection of the court. *Johnson v. Hubbell*, 773.
 6. WHERE PARTY HAS ADEQUATE REMEDY AT LAW, courts of equity will not entertain jurisdiction. *Lexington Life etc. Ins. Co. v. Page*, 165.
 7. WHERE COMPLAINANT'S REMEDY AT LAW HAS BECOME DOUBTFUL and embarrassed by the unconscientious conduct of the defendant, a court of equity will take jurisdiction of the cause. *City of Natchez v. Vanderwilde*, 581.
- See CORPORATIONS, 1-3; DOWER, 1; EJECTMENT, 1; NUISANCES, 1-8; SPEECHES PERFORMANCE; TRUST AND TRUSTEES; WILLS, 2.

ESTATES OF DECEDENTS.

1. NOTICE OF SALE OF REALTY OF DECEDENT, under statute authorizing publication "three weeks successively," is sufficient if published on some day in each of three successive weeks, though not published for three full weeks. *Morrow v. Weed*, 122.
2. DELIVERY OF BILL OF SALE, WHETHER TRANSACTION WAS GIFT OR SALE, consummates it and makes it valid; and in the absence of fraud, a wife cannot claim her distributive share of goods thereby conveyed by her deceased husband. *Cranson v. Cranson*, 534.
3. CHILDREN OF INTTESTATE WHO LEAVES NO WIDOW ARE ENTITLED TO PROPERTY of their father which was exempt by law from execution in his life time, under the Mississippi act of 1852. *Whitcomb v. Reid*, 579.
4. LICENSE TO SELL WHOLE REAL ESTATE OF DECEDENT, and published notice to show cause why license should not be granted to sell whole real estate, do not concur with and are not based upon a petition to sell a specific portion of the estate, and the license is therefore void; and it will not support an action by the administrator to recover the specific portion of the realty, under a statute that gives an administrator who has been licensed to sell certain lands an action to recover them as having been fraudulently conveyed by the decedent. *Ferry v. McOlellan*, 428.

ESTOPPEL.

See CO-TENANCY, 3; EMINENT DOMAIN, 9; SHIPPING, 8.

EVIDENCE.

1. EXPERT EVIDENCE IS INCOMPETENT if the facts proposed to be proved are within the common experience of mankind; as to show that the failure to occupy buildings insured increased the risk. *Melny v. Mohaut Valley Ins. Co.*, 380.
2. MEMORANDUM-BOOK IS ADMISSIBLE AS ORIGINAL ENTRY to show the quantity of timber, where a witness testifies that he took down upon a slate the quantity in each stick, and added up the several quantities, and

gave their sum to his wife or daughter, who entered it in his presence in the book, which the witness then examined to see if the entry was correct. *Pillsbury v. Locke*, 711.

3. QUANTITY OF TIMBER IN DISPUTE MAY BE SHOWN by the size of the team which hauled it and the condition of the roads, and the testimony of a witness who had been over the lot where it grew and described the size of the trees. *Id.*
 4. DECLARATIONS OF PARTY TO RECORD, OR ONE IDENTIFIED WITH HIM in interest, are competent evidence against such party. *Fickett v. Swift*, 214.
 5. JUDICIAL COGNIZANCE CANNOT BE TAKEN OF EXISTENCE, SITUATION, AND LIMITS OF PLACE, not being a public corporation, described by its name only. *Blanding v. Sargent*, 720.
- See ATTACHMENT, 2, 3, 6; COMMON CARRIERS, 1, 7; CONTRACTS, 3-5; CORPORATIONS, 11, 12, 26; COVENANTS, 6, 10; DEEDS, 1, 2, 6-8; PARTNERSHIP, 6; RAILROADS, 8; SHIPPING, 1; STATUTES, 4, 5; WASTE, 3; WITNESSES.

EXECUTIONS.

1. STATUTE PROVIDING THAT WHEN NO CORPORATE PROPERTY CAN BE FOUND ON WHICH TO LEVY EXECUTION against the corporation the acting manager, or some member of the corporation, may be notified to appear before the court and show cause why the individual property of the members should not be made liable is not unconstitutional or unreasonable, under a constitution which declares that "stockholders shall be subject to such liabilities and restrictions as shall be provided by law." *Hampson v. Wear*, 116.
2. EXECUTION ISSUED ON JUDGMENT AGAINST CORPORATION, after order that it be levied on individual property of the members, should follow the judgment, and run against the corporation, with a clause that it be levied on the property of the members; the clerk should not adjudicate on their membership by causing the execution to run against them personally, but should leave the officer to ascertain who are members as he may. *Id.*
3. SEIZURE OF PROPERTY UPON EXECUTION IS NECESSARY ACT in making a legal sale. And subsequent proceedings, in order to vest the title in the purchaser at execution sale, have reference to the time of the seizure, and depend upon the state of the title as it then was. *Benson v. Smith*, 285.
4. PROPERTY NOT WHOLLY IN COUNTY IN WHICH SHERIFF WAS COMMISSIONED to act could not be seized or sold by him prior to the passage of the act of January 28, 1852; and notices of sale of property, part of which was in a county to which his authority did not extend when he seized it, are nullities, and a sale made after and pursuant to such notices is void. *Id.*
5. MAINE STATUTE OF 1852 REQUIRES NOTICE OF EXECUTION SALE TO BE GIVEN at least thirty days before the sale, and a notice which is ineffectual until ten days before the sale is insufficient. That act does not dispense with any proceeding previously necessary to make a sale on execution valid. *Id.*
6. SHERIFF MAY COMPLETE DEPUTY'S RETURN OF EXECUTION, WHEN DEPUTY DIES after having made a sale of attached goods under the execution, and before finishing and signing his return. *Lovett v. Pike*, 248.
7. EVIDENCE IS ADMISSIBLE, WHEN DEPUTY SHERIFF DIES WITHOUT SIGNING RETURN of an execution of attached goods, in an action against the

sheriff for his and his deputy's default, to show the value and proper disposition, for there being no return, the evidence does not contradict it. *Id.*

9. PURCHASE BY DEPUTY SHERIFF AT HIS OWN EXECUTION SALE is a conversion for which the creditor may maintain trover, but he has no ground of complaint if the sale was for a fair price and the proceeds were applied on the execution. *Id.*
9. SHERIFF SELLING ATTACHED GOODS AT PRIVATE SALE BEFORE JUDGMENT is liable to account to the creditor only for what he has received, where the sale was for a fair price, and was necessary to prevent loss of the goods. *Id.*
10. SHERIFF SELLING ATTACHED GOODS ON EXECUTION, AND FAILING TO RETURN the execution, is liable only for the moneys received, less his expenses, where the sale was for a fair price, and according to law; otherwise he is accountable for their value. *Id.*
11. DENTIST IS NOT "MECHANIC," NOR DOES HE CARRY ON "TRADE," within the meaning of a statute exempting from execution the "tools of a mechanic necessary for carrying on his trade." *Whitcomb v. Reid*, 579.
12. STATE COURT MAY ENJOIN UNITED STATES MARSHAL from levying an execution from a federal court on the property of a person not named in the writ. *Mock v. Kennedy*, 203.

See JUDGMENTS.

EXECUTORS AND ADMINISTRATORS.

1. ACTION OF DEBT CANNOT BE MAINTAINED AGAINST EXECUTOR, under Kentucky statute of 1797, for a forfeiture incurred by his testator on a penal statute. *Cowan v. Campbell's Adm'r*, 184.
2. STATUTE OF KENTUCKY, PASSED IN 1812, SAVING RIGHT OF ACTION FOR PERSONAL INJURIES TO OR AGAINST ADMINISTRATORS AND EXECUTORS, in like manner with actions founded on contract, embraced actions for personal injuries only, and did not apply to injuries to real estate. *Id.*
3. ACTION GIVEN BY STATUTE AGAINST PARTY, BUT WHICH ABATES BY HIS DEATH, cannot be maintained against his personal representative. *Id.*
4. UNDER REVISED STATUTES OF KENTUCKY, IT IS NOT MADE DUTY OF ADMINISTRATOR who has the control of slaves merely for the purpose of administering the estate of his intestate to list a statement of them with the clerk of the county court, nor can he be fined for failing to do it. *Id.*
5. EXECUTOR CANNOT BE CHARGED IN ANY CAPACITY FOR SERVICES BENEFICIAL TO ESTATE, rendered before his appointment and without his assent, under contracts with a special administrator, and with another executor named in the will. *Luscomb v. Ballard*, 374.
6. ADMINISTRATOR'S SALE IS NOT RENDERED INVALID because the petition for leave to sell decedent's realty for the payment of his debts fails to state the value of his personal property, or to set forth a specific account of the debts due from decedent, nor because the notice of sale was insufficient; it is within the jurisdiction of the probate court to decide on the sufficiency of the petition, and of the notice of sale, and if the decision thereon is erroneous, an appeal will lie to correct the error; and until reversed, such decision is binding on every other court. *Morrow v. Weed*, 122.

2. **IS ADMINISTRATOR'S SALE IS VOID FOR WANT OF CONFIRMATION**, no title passes, and creditors and heirs of the estate are not entitled to equitable relief against purchasers at such sale; but must pursue their appropriate legal remedies: the creditors by proceeding in the probate court for a resale of the land, the heirs by suit at law to recover possession. *Bank of Missouri v. White*, 671.
3. **IF ADMINISTRATOR'S SALE IS NOT VOID BUT VOIDABLE MERELY ON ACCOUNT OF FRAUD** practiced by the purchaser, equity will relieve by converting the purchasers into trustees against their will, and making the land subservient to rights of the defrauded parties by way of equitable trust, but a creditor cannot acquire priority for his debt in equity in a case of this kind. *Id.*

EXEMPTIONS.

See ATTACHMENT, 9; EXEMPTIONS, 11.

EXPERTS.

See WITNESSES.

EX POST FACTO LAWS.

1. **EX POST FACTO LAWS** relate exclusively to crimes. *Railroad Co. v. Dickerson*, 148.
2. **WHERE NO CONTRACT EXISTS BETWEEN PARTIES, AMENDATORY ACT IS NOT EX POST FACTO LAW** which gives either party three years in which to prosecute an appeal after an assessment of damages for a right of way is made. *Id.*

FACTORS.

LIEN OF FACTOR IS PERSONAL PRIVILEGE WHICH IS NOT TRANSFERABLE, and no question upon it can arise except between the principal and factor. In Maine this principle has been adopted in relation to a statute lien. *Ames v. Palmer*, 271.

See SUPERCARGOES.

FIXTURES.

1. **BOILER SET IN BRICK-WORK, AND NOT REMOVABLE WITHOUT TAKING DOWN BRICK-WORK**, and steam-engine annexed by being bolted to granite block, both affixed by the owner of the freehold, become part of the realty, and a mortgage upon them as personalty, made to the manufacturer of them after sale and annexation, passes no title in them as against a subsequent purchaser of the real estate, even with notice of the mortgage. *Richardson v. Copeland*, 423.
2. **USAGE OF TRADE BETWEEN MANUFACTURERS AND PURCHASERS OF ENGINES AND BOILERS** to treat such property as personalty, is not competent to make such property personalty when annexed to the freehold. *Id.*

GARNISHMENT.

See ATTACHMENT.

GIFTS.

DONOR'S OWN PROMISSORY NOTE CANNOT BE SUBJECT OF VALID DONATION CAUSA MORTIS. *Flint v. Patten*, 742.

GRANTS.

1. GRANT OF PRINCIPAL THING CARRIES EVERYTHING NECESSARY to the beneficial enjoyment of the thing granted which the grantor has power to convey. *Hammond v. Woodman*, 219.
2. GRANT OF MILL CARRIES RIGHT TO FLUME OR RACE-WAY annexed thereto running through the grantor's land, necessary to its enjoyment. *Id.*
See PUBLIC LANDS.

GUARANTY.

See SURETYSHIP.

HIGHWAYS.

1. ALL PERSONS, INCLUDING CHILDREN, HAVE RIGHT TO PASS AND REPASS on public roads, so long as they violate no laws for the common good, or for the protection of individuals. *Stinson v. City of Gardiner*, 281.
2. ANY PART OF HIGHWAY MAY BE USED BY TRAVELER, either on business or pleasure, and in such manner as may suit his convenience or taste, provided he conforms to all laws and well-settled rules connected with such use. *Id.*
3. SAFETY AND CONVENIENCE FOR TRAVELERS AND THEIR TEAMS AND VEHICLES are the rule by which it is to be determined whether or not there be any defect, or want of repair, or sufficient railing upon highways. *Id.*
4. PUBLIC HAVE NO RIGHT IN HIGHWAY EXCEPT RIGHT TO PASS and repass thereon. *Id.*
5. CHILD USING HIGHWAY AS PLAY-GROUND, AND NOT FOR TRAVEL, cannot recover for an injury received during such use, although the injury resulted from a defect in the road. *Id.*
6. PERSON OBSTRUCTING HIGHWAY IS LIABLE TO TOWN THEREFOR, and will be bound by a judgment recovered by a traveler against the town for injury therefrom, where he is duly notified of the pendency of the suit. *Littleton v. Richardson*, 759.
7. IN ACTION TO CHARGE PERSON WITH DAMAGES RECOVERED BY TRAVELER against town, on account of injury suffered by him by reason of obstructions placed by defendant in a public highway, plaintiff, to sustain the same, must prove: 1. The contract or relation upon which the liability over depends; 2. An action for a cause for which the defendant is so liable under that contract or relation; 3. A notice to the defendant to take upon him the defense of the suit; 4. A recovery of damages, of which the record is conclusive evidence when the other points are established; and no presumption is allowed in favor of any of these points. *Id.*
8. CITY OR TOWN IS NOT LIABLE TO PERSON INJURED by combined effect of defect in highway and negligence of third person. *Rowell v. City of Lowell*, 464.
9. CITY OR TOWN IS LIABLE TO PERSON INJURED BY DEFECT IN HIGHWAY, if the contributing cause is a pure accident, and one which common prudence and sagacity could not have foreseen and provided against. *Id.*

GUARDIAN AND WARD.

PROVISIONS OF IOWA ACT OF 1843, SECTION 20, CHAPTER 11, ARE PER-
EMPTORY, and not directory only, and to render valid a guardian's sale of

real estate made thereunder it must appear, either from the record or by evidence *affande*, that the guardian took the oath required by the statute before fixing on the time and place of the sale. *Cooper v. Sunderland*, 52.

HOMESTEADS.

SUBSEQUENT ADOPTION OF REAL ESTATE AS HOMESTEAD cannot affect the validity of the owner's undertaking to sell and convey it, or release him from his obligation entered into before it was made a homestead. *Yost v. Devault*, 92.

HUSBAND AND WIFE.

RULE THAT SETTLEMENT BONA FIDE MADE BEFORE AND IN CONTEMPLATION OF MARRIAGE IS GOOD against the husband and his subsequent creditors and purchasers, applies to cases where property is settled on the intended wife by the intended husband, and is yet more inflexible in cases where the intended wife, with the knowledge of her intended husband, secures her own property to her own use and that of her children. *Spears v. Shropshire*, 208.

INFANCY.

See **STATUTE OF LIMITATIONS**, 3.

INJUNCTIONS.

See **ATTACHMENT**, 7; **EXECUTIONS**, 12; **NUISANCES**, 1; **STATUTE OF FRAUDS**, 10.

INNS.

INNKEEPER IS LIABLE FOR DAMAGE TO GUEST'S HORSE by the horse of another guest without any negligence on the part of the innkeeper. *Sibley v. Aldrich*, 745.

INSANITY.

1. **CONSIDERATION NEED NOT BE RESTORED TO GRANTEE IN DEED OF INSANE PERSON** before action can be maintained for recovery of the land. *Gibson v. Soper*, 414.
2. **VERDICT AND JUDGMENT ON PETITION FOR GUARDIANSHIP OF ALLEGED INSANE PERSON**, by which such person was found to be not insane at the time of the filing of the petition, nor at the rendering of the verdict, is not conclusive evidence of the sanity of such person during the intermediate period, in an action to recover land embraced in a deed made by him during such period; though they are admissible upon the question of insanity as evidence of their having been rendered. *Id.*

See **DEEDS**, 10, 11.

INSOLVENCY.

See **BANKRUPTCY AND INSOLVENCY**.

INSURANCE.

1. **SUFFICIENCY OF PRELIMINARY PROOF OF LOSS UNDER POLICY OF INSURANCE** is not admitted, nor further proof waived, by the action of the president of the insurance company, on inquiry being made of him as to "what further preliminary proof of loss was required," in answering that "the policy will show that." *Spring Garden etc. Ins. Co. v. Evans*, 308.

2. PARTIES TO CONTRACT OF INSURANCE MAY, BY EXPRESS STIPULATION, LIMIT TIME within which an action must be brought thereon to a shorter period than that prescribed by the general statute of limitations. *Fulham v. New York Union Ins. Co.*, 462.
3. INSURANCE CONTRACT, LIMITING TIME IN WHICH TO SUE, IS EQUALLY BINDING BETWEEN PARTIES, in Massachusetts, whether the insurers are a stock company or a mutual insurance company, established by the laws of that commonwealth or of any other state. *Id.*
4. TO RELIEVE PARTY FROM HIS OWN EXPRESS CONTRACT OF INSURANCE, limiting time in which suit must be brought, bad faith or unreasonable delay must be shown on the part of insurers. In the absence of such evidence, a suit commenced after the stated time agreed upon will be barred. *Id.*
5. ASSIGNEE, WITH INSURERS' CONSENT, of interest of one to whom policy is payable becomes entitled to whatever those originally insured may be entitled to receive in case of loss; but he does not acquire the full rights of an assignee of a chose in action, but recovers in the right of the parties insured, and not in his own, and is affected by subsequent acts of the insured. *Hale v. Mechanics' Mut. Fire Ins. Co.*, 410.
6. POLICY IS AVOIDED BY OBTAINING SUBSEQUENT INSURANCE WITH MERE ORAL CONSENT OF PRESIDENT of the insurance company, when the by-laws of the company provide that insurance subsequently obtained without the written consent of the president shall avoid the policy, and that the by-laws shall in no case be altered except by a vote of two thirds of the members of the company. *Id.*
7. INSURANCE AGENTS WITH GENERAL POWERS TO FILL UP AND ISSUE POLICIES HAVE AUTHORITY, before the delivery and acceptance of a policy and payment of the premium, to change or modify the description of the property by adding a memorandum that the buildings insured were in course of construction. *Manufacturing Co. v. Fire Ins. Co.*, 376.
8. INSURED IS NOT AFFECTED BY OMISSION OF INSURANCE AGENTS TO COMPLY WITH INSTRUCTIONS to transmit to the company copies of the written parts of all policies issued by the agents, and of any indorsements made thereon by them. *Id.*
9. WARRANTY OF "WATER-TANKS WELL SUPPLIED WITH WATER AT ALL TIMES" IS COMPLIED WITH, when the insurance is upon buildings in course of construction, if the tanks, although not completed and supplied with water, are constructed with all reasonable diligence, having reference to the progress in the construction of the buildings insured. *Id.*
10. MASTER MAY TRANSHIP INSURED CARGO if original ship is disabled; and if he, acting with discretion, forwards the cargo in another ship, such change will not discharge the insurer of the goods from liability for loss which may take place subsequent to transshipment; but if the transshipment is not necessary, or without the insurers' consent, he will be discharged. *Salisbury v. Marine Ins. Co.*, 687.
11. DELAY OF TWELVE DAYS IN TRANSPORTATION OF INSURED CARGO, occasioned by waiting for necessary repairs, will not justify transshipment of cargo in another vessel. By such transshipment the insurers are discharged from liability for loss subsequently happening to the cargo in the new bottom. *Id.*

- 22. INSURERS GUARANTEE ONLY SAFE ARRIVAL OF GOODS.** They do not guarantee speedy arrival, nor arrival in time for an advantageous market, nor do they incur loss from delay in the voyage, unless the delay is produced by peril insured against, or the cargo be subject to deterioration by mere lapse of time. *Id.*

INTEREST.

See DAMAGES, 8; USURY.

JUDGMENTS.

1. WHERE JUDGMENT IS RENDERED FOR MORE THAN PARTY IS ENTITLED TO RECOVER, the appellate court will correct the error, even where the judgment below was by default. *Gower v. Carter*, 71.
2. WHERE PREMISES ARE SPECIFICALLY DESCRIBED IN JUDGMENT, and the plaintiff takes more under his *habere facias possessionem* than he is entitled to recover, the defendant cannot have restitution by motion in the court from which the writ issued. *City of Natchez v. Vanderveide*, 581.
3. WHERE JUDGMENT CREDITOR IS PREVENTED FROM ENFORCING HIS EXECUTION within the time prescribed by the statute of limitations, by an injunction granted at the instance of a mortgagee of the property levied on, the lien of whose mortgage was, at the time when the injunction issued, inferior to that of the judgment, such mortgagee cannot take advantage of the fact that the lien of the judgment is lost, and is not entitled to hold the property discharged of the lien of the judgment. *Work v. Harper*, 549.
4. WHERE JOINT JUDGMENT IS RENDERED AGAINST PRINCIPAL AND SURETY, as joint makers of a promissory note, the judgment creditor is not required to file an affidavit of the insolvency of the principal before levying his execution on the property of the surety, unless the surety makes his affidavit of the fact of his suretyship. *Id.*
5. JUDGMENT AGAINST TOWN FOR DAMAGES FOR INJURY CAUSED BY OBSTRUCTIONS IN HIGHWAY may be evidence in another action to charge the person causing such obstruction with the amount of such judgment, of the facts on which judgment was obtained, where it appears on the face of the record that the recovery must have been for the same cause; otherwise the facts on which such judgment was rendered must be proved before the judgment can be admitted as evidence of anything beyond its own rendition and tenor. *Littleton v. Richardson*, 759.
6. RECORD OF VERDICT AND JUDGMENT IS ALWAYS ADMISSIBLE TO PROVE FACT THAT SUCH JUDGMENT WAS RENDERED or such verdict returned, in any case where the fact of such verdict or judgment, or the nature or amount of such judgment, becomes material; but for any other purpose it is not evidence against a stranger. *Id.*
7. JUDGMENT FAIRLY OBTAINED AGAINST ONE IS AS CONCLUSIVE against another who is responsible over to the former, either by operation of law or by express contract, where he is duly notified of the pendency of the suit and requested to defend the same, as though he was the real party upon the record, and whether he appeared or not. *Id.*
8. JUDGMENT IS CONCLUSIVE ON PARTIES ONLY AS TO WHAT WAS DIRECTLY IN ISSUE in the case in which it was rendered. And in order to render a former judgment a complete bar, it must appear to have been a decision
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upon the merits; if the suit is discontinued, or the plaintiff becomes nonsuit, or there is no judgment upon the matter in issue, the proceedings are not conclusive. *Lord v. Chadbourne*, 290.

9. JUDGMENT IN REM BY COURT OF SPECIAL AND EXCLUSIVE JURISDICTION is an adjudication upon the *status* of some particular subject matter, and is conclusive upon all persons. *Id.*
10. IN PROCEEDING UPON SEIZURE OF LIQUORS, JUDGMENT OF DISMISSAL, and for return of the liquors seized, is not an adjudication upon the *status* of the liquors; and in an action to recover the value of the liquors subsequently brought by their owner against the officer who seized them, evidence that at the time of the seizure the plaintiff kept them for sale, he not having a license to sell, and that he had been in the habit of selling them in violation of law, is admissible on the part of the defendant for the purpose of showing the *status* of the liquors, and of determining their value with reference to the question of damages. *Id.*
11. JUDGMENT NOT CONCLUSIVE.—In action for several breaches of covenant in lease of real estate, all denied in answer, general verdict and judgment for nominal damages are not of themselves conclusive evidence of one of the breaches, in subsequent action by lessee against lessor, for entering and expelling him from the premises for such breach. *Sawyer v. Woodbury*, 518.
12. JUDGMENT CONCLUSIVE.—In action for several breaches of covenant in lease of real estate, all denied in answer, general verdict and judgment for nominal damages are conclusive in subsequent action by lessee against lessor for entering and expelling him from the premises for such breach, if other evidence is adduced that the issue upon that covenant was submitted to the jury in the former action; but the burden of proof is on defendant. *Id.*

See ATTORNEY AND CLIENT, 1, 2; EXECUTIONS; JURISDICTION, 6; LIENS; NEGOTIABLE INSTRUMENTS, 15, 16.

JUDICIAL SALES.

PURCHASER AT JUDICIAL SALE IS SUBSTITUTED TO RIGHTS OF JUDGMENT CREDITOR under whose execution he purchased, and a disclaimer or conveyance by the judgment debtor, after the judgment became a lien on the property, will not affect his rights therein. *Campbell v. Lowe*, 336.

JURISDICTION.

1. EVERY PRESUMPTION IS MADE IN FAVOR OF JURISDICTION of courts superior and of general jurisdiction, while this presumption is not exercised in relation to the jurisdiction of a court inferior and limited, which must be shown. But where the jurisdiction of an inferior and limited court is shown, there the same presumption prevails in favor of its proceedings that does in favor of those of a superior court. *Cooper v. Sunderland*, 52.
2. NO PRESUMPTION PREVAILS IN FAVOR OF JURISDICTION OF COURTS OF INFERIOR AND LIMITED POWERS, but such jurisdiction must be shown. *Morrow v. Weed*, 122.
3. INFERIOR COURTS MUST PURSUE THEIR STATUTORY AUTHORITY STRICTLY, that is, in the manner dictated; but such a rule does not assume that the

slightest possible deviation is fatal, but rather that the court must exercise the power substantially in the manner prescribed. *Id.*

4. DISTRICT COURT OF UNITED STATES HAS JURISDICTION WHEN IT IS SHOWN THAT PARTIES TO SUIT are citizens of different states, and that the amount in controversy exceeds five hundred dollars. *Hunt v. Orwig*, 144.
5. JURISDICTION IN CAUSES IN WHICH FOREIGN STATES ARE PLAINTIFFS has not been exclusively vested in the federal courts, and hence the state courts may still exercise jurisdiction in all such cases. *King of Prussia v. Kuepper's Adm'r*, 639.
6. PROCEEDINGS AND JUDGMENT OF COURT ARE CONCLUSIVE as to all matters within its jurisdiction, and cannot be impeached or set aside in a collateral proceeding. *Hampson v. Weare*, 116.
7. WHEN POWER IS GIVEN TO COURT OVER SPECIAL MATTER which is not in the usual course of the common law, and a mode for the exercise of such power is prescribed, such mode must be pursued, whether the tribunal be superior or inferior, and sufficient must appear on the face of the record to show the case to be within the reach or jurisdiction of the tribunal. If sufficient appears on the face of the record to give the court jurisdiction under the law conferring the power, then the presumption attaches in favor of the remainder of the proceedings of the court, whatever that court may be. *Cooper v. Sunderland*, 52.
8. SUFFICIENCY OF PETITION CALLING INTO ACTION POWER OR JURISDICTION of the court, if there be such petition, cannot be called in question collaterally. And if there be a notice or publication, or whatever of this nature the law requires in reference to persons, its sufficiency cannot be questioned collaterally. *Id.*

See EQUITY; PROBATE COURTS.

JURY AND JURORS.

1. CONSCIENTIOUS SCRUPLES entertained by a person, which would prevent him from assenting or agreeing to a verdict which would subject the accused to capital punishment, although justified by the evidence, disqualify him as a juror. *Williams v. State*, 615.
2. OBJECTION TO INFLECTION OF CAPITAL PUNISHMENT.—A juror whose examination developed that he was opposed to capital punishment; who said "that he had conscientious scruples upon the subject of capital punishment; that they would bias his judgment," is not in a condition to impartially hear and examine the evidence; he does not stand indifferent between the prisoner and the state, and he should be excused. *Id.*
3. JUROR, WHEN CONSCIENTIOUS SCRUPLES TO INFLECTION OF DEATH PENALTY DO NOT DISQUALIFY.—A juror testified that he "did have conscientious scruples on the subject of capital punishment, and that it would be against his conscience to render a verdict by which a party would be subjected to the punishment of death, but that he thought he could do justice as between the state and the accused:" *held*, that he was competent, as in the absence of any other possible evidence his answer under oath that he would do justice between the parties must be held to be conclusive. *Id.*
4. IN ACTIONS OF LIBEL, CIVIL AS WELL AS CRIMINAL, JURY ARE JUDGES AS BOTH LAW AND FACTS. *Tresca v. Maddox*, 198.

6. **IT IS DUTY OF JUDGE IN ALL CASES** to give the jury a knowledge of the definitions and principles of law applicable to the case, and under the statute of Louisiana, in all appealable cases, the judge may be required by counsel to charge the jury in writing, they having the power to disregard his instructions. *Id.*
 8. **IT IS QUESTION FOR JURY WHETHER PERSON HAS ACTED IN EXCESS OF HIS AUTHORITY**, in cases where the justification of the act which is alleged to be wrongful and injurious is based on the exercise of authority, whether that authority be incident to the official character and duty of the party exercising it, or arise from the misconduct of the opposite party and the necessities of the case. *Hilliard v. Gould*, 765.
- See **LIBEL**, 1; **PLEADING AND PRACTICE**, 6-16; **RAILROADS**, 4; **RIPARIAN RIGHTS**, 2; **WAIVER**.

LANDLORD AND TENANT.

1. **LESSOR HAS ACTION ON LESSOR'S COVENANT TO REPAIR** without giving him notice of want of repair, especially where the lease contains a covenant that the lessor may enter to view and make improvements. *Hayden v. Bradley*, 421.
2. **WHEN RENT IS PAYABLE AT STATED PERIODS IN ADVANCE**, the lessee has the whole of the first day of that period in which to pay it. *Sherlock v. Thayer*, 539.

LARCENY.

See **CRIMINAL LAW**, 3.

LATERAL SUPPORT.

See **EASEMENTS**, 5.

LIBEL.

1. **WHERE FIRST PART OF ALLEGED LIBELOUS PUBLICATION IS JUSTIFIED AS TRUE AND LATTER PART IS DENIED AS APPLYING TO PLAINTIFF**, the ordinary and natural meaning and construction of the language used, the declaration containing no averment of any fact which would affect the meaning of the language, no innuendo pointing any expression or allusion therein made to plaintiff, and no colloquium alleging that the language was used of and concerning plaintiff, is a question of law for the court, and it cannot be left to the jury to infer that the latter part of the publication did refer to plaintiff. *Barrows v. Bell*, 479.
2. **IT IS QUESTION OF CONSTRUCTION FOR COURT WHETHER ALLEGED LIBELOUS PUBLICATION** purports to be a charge of fraud made by the writer upon plaintiff; or whether it is an allegation that such a charge had been made against plaintiff before a public body, such as a medical society, and of which plaintiff was a member. *Id.*
3. **PUBLICATION OF QUASI JUDICIAL PROCEEDINGS** before all public bodies, for the necessary information of the people, is privileged and justifiable. *Id.*
4. **IT IS QUESTION OF FACT FOR JURY WHETHER ALLEGED LIBELOUS PUBLICATION** is a true and correct narrative of quasi judicial proceedings before a public body, which may lawfully be published; and if found to be true, defendant is entitled to a verdict. *Id.*

5. IN ACTIONS OF LIBEL, MALICE IS OFTEN IMPLIED. Rule at common law being that if the words spoken or published are in themselves actionable, malicious intent is an inference of law, and needs no proof. Malice does not mean spite against the individual, but a wanton disposition grossly negligent of the rights of others. *Tvesca v. Maddox*, 198.
6. LIBEL.—PARTY HAS RIGHT, AS CHRONICLER OF EVENTS that actually occurred, to report the fact that another has been arrested and held for examination upon a particular charge; but beyond this he cannot go, and assume the guilt of another upon an *ex parte* charge, except upon the responsibility of proving the truth of his accusation when sued for libel. *Id.*
7. LIBEL.—REPARATION MADE BY RECAPTURING CHARGES the day after they were made cannot exonerate the party entirely, but may properly be considered by the jury in estimating the amount of damages. *Id.*
8. LIBELED PARTY MAY RELEASE HIS CLAIM FOR DAMAGES, BUT BARE EXPRESSION OF SATISFACTION at an apology and recantation will not operate a release of the right of action. *Id.*
9. IN ACTIONS OF LIBEL, DAMAGES CAN BE GIVEN WITHOUT SPECIAL PROOF of the pecuniary amount suffered, where the libel is not published by the party himself, but through one of his employees in the regular course of his employment, and for whose act the principal is legally responsible. *Id.*

See JURY AND JURORS, 4; SLANDER.

LIENS.

1. LIEN IS LOST BY INCLUDING IN SAME JUDGMENT CLAIM for which no valid lien exists and one for which such a lien does exist. *Perkins v. Pike*, 267.
 2. WHERE STATUTE OMITS TO REQUIRE NOTICE TO BE GIVEN to all parties interested in lien cases, the judgment may conclude the parties to the suit, but it cannot bind others. *Id.*
 3. LIEN IS RIGHT OF DETAINING PROPERTY ON WHICH IT OPERATES until the claims which are the basis of the lien are satisfied. *Ames v. Palmer*, 271.
- See ATTORNEY AND CLIENT, 1, 2; BAILMENTS, 13; COMMON CARRIERS, 14-17; FACTORS; SALES, 6; SHIPPING, 2-9.

LIQUOR LAWS.

See ACTIONS, 2, 3.

LOST ARTICLES.

- PARTY IS NOT RESPONSIBLE FOR LOSS OF REMITTANCES BY LETTER deposited in post-office box specially set apart for his use. *Johnson v. Martin*, 193.
- See NEGOTIABLE INSTRUMENTS, 22-24.

LOTTERY.

See CRIMINAL LAW, 4.

MALICIOUS PROSECUTION

- CONCLUSIVE EVIDENCE OF PROBABLE CAUSE.—Conviction of party by jury, though the verdict was obtained by false testimony, and afterwards set aside for newly discovered evidence and a verdict of not guilty returned, is conclusive evidence of probable cause in a subsequent action for malicious prosecution. *Parker v. Huntington*, 455.

MANDAMUS.

1. MANDAMUS MAY ISSUE TO GOVERNOR FROM STATE SUPREME COURT, when state constitution delegates the power to issue writs of mandamus to that court, and makes no exceptions as to persons. *Pacific R. R. v. The Governor*, 673.
2. GOVERNOR IS SUBJECT TO MANDAMUS to compel performance of ministerial acts, but the performance of discretionary acts cannot be compelled by courts. *Id.*

MARRIAGE AND DIVORCE.

1. LEGAL MARRIAGE OF FEMALE CHILD AFTER ATTAINING STATUTORY AGE OF LAWFUL WEDLOCK discharges her from all further duties to perform service for her parents, as she has assumed new relations inconsistent therewith. *Hervey v. Moseley*, 515.
2. ORDINARY CONTRACTS PROHIBITED BY PENAL STATUTE are illegal and invalid, but marriage is an exception. *Id.*
3. MARRIAGE CONTRACT OF FEMALE IS VALID AFTER SHE REACHES STATUTORY AGE OF LAWFUL WEDLOCK, twelve years, notwithstanding the penalty incurred by those uniting her in marriage while she is under the age of eighteen, and the fact that it was made without the consent of her parent or guardian. *Id.*
4. PARENT HAS NO ACTION.—FALSE AND FRAUDULENT REPRESENTATIONS TO OFFICERS, AND THOSE AUTHORIZED TO SOLEMNIZE MARRIAGES, and which culminate in a clandestine marriage, form no cause of action for loss of daughter's services after she has attained the statutory age of lawful wedlock, twelve years, and before she has reached that age under which the statute prohibits her from marrying without the consent of her parent or guardian. It is a criminal offense. *Id.*
5. SECOND MARRIAGE CONSUMMATED IN MISSISSIPPI IS BINDING IN LOUISIANA, although the first marriage was void by the law of Mississippi, the husband having at that time a wife living, but from whom, before the second marriage, he had been divorced. *Spears v. Shropshire*, 208.

See PARENT AND CHILD; STATUTE OF LIMITATIONS, 3.

MARRIED WOMEN.

1. WIFE CANNOT CLAIM PAYMENT FOR SUCH PROPERTY AS SHE MAY BRING INTO HER HUSBAND'S HOUSEHOLD upon their marriage, and which they use and enjoy together, in the absence of an express contract to that effect. No implied contract exists by virtue of the marital relation. *Cranston v. Cranston*, 534.
2. WIFE WHO IS DESERTED BY HUSBAND, and who continues to live apart from him, and is dependent on herself for support, may sue and be sued as a *feme sole*. *Smith v. Silence*, 137.
3. MARRIED WOMAN HAS RIGHT TO JUDGMENT OF SEPARATION OF COMMON PROPERTY upon proof of the insolvency of her husband, and that she is possessed of skill and industry sufficient to earn a separate livelihood which she has exercised. *Mock v. Kennedy*, 203.

See DOWER; HUSBAND AND WIFE.

MASTER AND SERVANT.

See PARENT AND CHILD.

MORTGAGES.

1. MORTGAGES, TO SECURE FUTURE LIABILITIES, MUST EXPRESS THAT OBJECT. *Owle's Heirs, etc. v. Eddy*, 699.
2. MORTGAGE IS DISCHARGED BY PAYMENT OF MORTGAGE NOTE BY DEBTOR OF MORTGAGOR, at the mortgagor's request. *Bowman v. Manier*, 743.
3. MORTGAGE IS NOT REVIVED AFTER NOTE IS TAKEN UP AND PAID, as against an execution creditor of the mortgagor, by the mortgagor's redelivering the note the next day to the mortgagee, upon an understanding, for the first time, that the note and mortgage were to remain in the mortgagee's hands, as security against a liability incurred by the mortgagee for the mortgagor. *Id.*

See CO-TENANCY, 2; DOWER, 1-5; STATUTE OF LIMITATIONS, 5, 6.

MUNICIPAL CORPORATIONS.

See CORPORATIONS, 24, 25.

MURDER.

See CRIMINAL LAW, 6, 7.

NAVIGABLE RIVERS.

See WATERCOURSES.

NEGLIGENCE.

1. NEGLIGENCE OR FAULT OF PLAINTIFF REMOTELY CONNECTED WITH INJURY will not prevent him from recovering damages therefor against a defendant whose negligence has been the immediate and proximate cause of the injury. *Vicksburg & Jackson R. R. Co. v. Patton*, 552.
2. FACT THAT PERSON IS IN EXCITING AND ALARMING SITUATION AT TIME OF INJURY will not reduce the degree of care requisite for him to exhibit to avoid the injury, if he is in such situation wrongfully, or because of his own negligence. *Lucas v. New Bedford etc. R. R. Co.*, 406.
3. PLAINTIFF, THOUGH THERE MAY HAVE BEEN NEGLIGENCE ON HIS PART, MAY RECOVER, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendants' negligence. *Id.*
4. ANY NEGLIGENCE IN EXERCISE OF RIGHT WHICH CAUSES LOSS TO ANOTHER is an injury which confers upon him a right of action. *Morgan v. Cos*, 623.
5. ONE WHO DOES WHAT IS MORE THAN ORDINARILY DANGEROUS to another is bound to use more than ordinary care where the parties stand in no particular relation to each other. *Id.*
6. IN ACTION FOR KILLING ANOTHER'S SLAVE BY NEGLIGENT HANDLING OF LOADED GUN, it is no defense that the act occurred through misadventure and without the defendant's intending it, but the defendant must show that the injury was inevitable and utterly without his fault. *Id.*

See AGENCY, 1; COMMON CARRIERS; STATUTE OF LIMITATIONS, 12; SUPER-CARGOES.

NEGOTIABLE INSTRUMENTS.

1. WAREHOUSE RECEIPT FOR CERTAIN NUMBER OF BUSHELS OF CORN, to be delivered to the order of the person to whom the receipt is given, at a

certain place, in sacks, in good order, free of charges, risk of fire excepted, is not a negotiable instrument under the laws of Iowa. *Merchants' etc. Bank v. Hewitt*, 49.

2. USE OF WORDS "TO BE DELIVERED TO HIS ORDER," in a warehouse receipt for a quantity of corn, do not of themselves manifest an intention on the part of the maker to render it negotiable. *Id.*
3. HOLDER OF NEGOTIABLE PROMISSORY NOTE INDORSED IN BLANK has a *prima facie* title thereto, which, in the absence of proof of *malis fides*, will entitle him to sue on it in his own name. *Krabel v. Spooner*, 332.
4. POSSESSION OF NEGOTIABLE PROMISSORY NOTE INDORSED IN BLANK by the attorney of a party is possession by the party himself. *Id.*
5. PROTEST AT REQUEST OF BANK OF NOTE INDORSED IN BLANK, and which does not bear the name of the bank, is not, in a subsequent suit in the name of a holder, any more evidence of the ownership of the note by the bank at the time of the protest than that at the time of the protest the bank was the collecting agent for the real owner, nor does it show that the holder after protest was not the owner who placed it in the bank for collection, so as to defeat the former's *prima facie* right of action based on possession. *Id.*
6. NOTARY'S CERTIFICATE OF PROTEST IMPORTS VERBAL NOTICE to the indorser of non-payment of a note, where it states that he "duly notified" the indorser, without other qualification of the word "notified." *Ticonic Bank v. Stackpole*, 246.
7. VERBAL NOTICE TO INDORSER RESIDING IN SAME TOWN of non-payment of a note is sufficient. *Id.*
8. STATEMENT IN PROTEST THAT NOTARY "DULY NOTIFIED" INDORSER of non-payment of a note does not impair its validity, where it appears from the whole protest that notice was in fact legally given. *Id.*
9. SURETIES BY SUCCESSIVE INDORSEMENTS ON MERCANTILE PAPER are presumed to mean to stand as they have placed themselves; but if there is an agreement between them to become indorsers for the accommodation of the drawer, they are presumed to promise to contribute equally toward any loss which may be occasioned by non-payment. *McNeilly v. Patchin*, 651.
10. PARTY CANNOT LIMIT HIS LIABILITY AS INDORSER BY PAROL EVIDENCE, where he signs his name on back of draft under payee's name before it is transferred to another holder, although he never had any personal interest in the draft. *Prescott Bank v. Caverly*, 473.
11. FIRST INDORSER IS RESPONSIBLE TO EVERY HOLDER, and to every person whose name is on the note subsequent to his own and who has been compelled to pay the amount of the note. *McNeilly v. Patchin*, 651.
12. SUCCESSIVE INDORSERS OF ACCOMMODATION PAPER are not joint sureties, in the absence of any understanding or agreement between themselves in regard to the manner of indorsing. *Id.*
13. LEGAL CAPACITY OF PAYEE TO INDORSE DRAFT CANNOT BE DISPUTED BY SECOND INDORSER, in an action against the latter on the bill, upon the ground of a want of legal capacity in payee to indorse, such as being a married woman. *Prescott Bank v. Caverly*, 473.
14. INDORSER OF SIGHT DRAFT IS LIABLE TO HOLDER ON DEFAULT OF DRAWER, if it is presented within a reasonable time after it is received from the indorser. *Id.*

15. PRESENTMENT IS ORDINARILY MIXED QUESTION OF LAW AND FACT, to be decided by the jury under proper instructions from the court. Especially is this so where the facts are doubtful. *Id.*
 16. PRESENTMENT IS QUESTION OF LAW, where the facts are clear and uncontradicted. *Id.*
 17. DEMAND FOR PAYMENT OF NOTE OR BILL DUE BY PARTNERSHIP is a sufficient presentment if made within the usual business hours at the commercial domicile of the firm. It is not necessary to make a further demand at the private residence of the individual partners. *Watson v. Templeton*, 194.
 18. NOTARY COMPLIES STRICTLY WITH COMMERCIAL USAGE IN GIVING NOTICE EXCLUSIVELY TO LAST INDORSEER, especially if he is ignorant of the residence of the other parties to a bill of exchange. *Id.*
 19. "THE DAY" WHICH EACH INDORSEER IS ALLOWED WITHIN WHICH TO GIVE HIS NOTICES in turn will commence with that on which he himself receives notice, where the distance is such as to require an interval of several days for the purposes of communication. *Id.*
 20. HOLDER OF BILL OF EXCHANGE IS NOT BOUND TO MAKE PUBLIC PROCLAMATION, or to advertise for information concerning the residence of one whose domicile is without the state. *Id.*
 21. CONTRACT BETWEEN PAYEE AND INDORSEER OF NOTE DISCHARGED IN BANKRUPTCY IS ADMISSIBLE IN EVIDENCE in an action on the note by a subsequent indorsee against the maker, where the maker, after the discharge, promised to pay to the first indorsee an amount sufficient to reimburse him what he had paid for the note. *Badger v. Gilmore*, 729.
 22. UPON PROOF THAT NOTE HAS BEEN DESTROYED, RECOVERY MAY BE HAD THEREON AT LAW. *Moore v. Full*, 297.
 23. OWNER OF LOST NOTE MAY MAINTAIN ACTION THEREON AT LAW, without furnishing an indemnity, if it appears that the statute of limitations may be interposed to prevent a recovery by a *bona fide* holder. *Id.*
 24. COURT CANNOT DISMISS ACTION ON LOST OR DESTROYED NOTE, properly commenced and legally pending, unless the plaintiff tender a bond of indemnity. If the evidence be insufficient to prove its destruction or loss, the defendant is entitled to a verdict in his favor, but not to a dismissal of the action. *Id.*
- See AGENT, 3, 4; BANKRUPTCY AND INSOLVENCY, 1, 2; GIFTS; PARTNERSHIP, 4.

NUISANCES.

1. COURT OF EQUITY HAS POWER, BY INJUNCTION, TO PREVENT OR ABATE NUISANCE materially injurious to the person or property of another; such as one which occasions loss of health, loss of trade, destruction of the means of subsistence, or permanent ruin to property; but it will not interfere to prevent or abate every nuisance. *Wolcott v. Melick*, 790.
2. CASE OF NUISANCE IN WHICH EQUITY WILL INTERFERE MUST BE ONE AT LAW, and in which a party can maintain an action for alleged injury to his legal rights. Thus, chancery will enjoin the prosecution of a legal trade where it is carried on in such a manner as to injure an adjoining tenement, or to affect the air with noisome smells, gases, or smoke, injurious to health, or rendering the enjoyment of life within a neighboring dwelling-house uncomfortable. *Id.*

2. COURT OF EQUITY WILL NOT INTERPOSE TO PREVENT NUISANCE OCCASIONED BY CARRYING ON OF LEGAL TRADE, unless such nuisance be in actual existence and established by clear and satisfactory evidence; or unless the prosecution of the business from which the nuisance is apprehended, and the establishment of which the court is called upon to prevent, is of such a character as to necessarily produce the mischief which the court is called upon to prevent. *Id.*
4. INJUNCTION TO PREVENT ERECTION OF BUILDING FOR MANUFACTURING PURPOSES, on ground of its being a nuisance to an adjoining dwelling-house, will not be granted unless a very strong case is made, and one which is marked by some very peculiar features. *Id.*
5. INJUNCTION WILL SOMETIMES BE GRANTED IN CASE OF MERE APPREHENDED DANGER; as, to prevent the erection of a hospital or of a gunpowder magazine in the neighborhood of a town, and near to dwelling-houses. And this is on the ground of the reasonable fears and apprehensions which such erections excite; but a court of equity will generally compel an individual who asks protection against inconvenience or apprehended damage, arising from the prosecution of some legal enterprise, to establish his right to protection by the verdict of a jury before it will interfere in his behalf. *Id.*
6. COURT OF EQUITY WILL ENJOIN NUISANCE IF IT IS ADMITTED, or if the erection contemplated must from its character necessarily be a nuisance to complainant, and his legal remedy is not adequate. *Id.*
7. COURT OF EQUITY WILL NOT ENJOIN ERECTION OF BUILDING IN CITY in which a steam-engine and machinery for manufacturing purposes are to be placed. It will not be assumed that a lawful business is to be so conducted as to render it a nuisance; but if so conducted in fact, injured persons will be protected therefrom. *Id.*
8. BILL TO RESTRAIN NUISANCE FROM WHICH INDIVIDUAL SUSTAINS SPECIAL DAMAGE may be filed without making the attorney general a party; although it may be right to make him a party in case of a public nuisance. *Id.*
9. STATUTE CONFERRING ON MUNICIPAL CORPORATION "FULL POWER AND AUTHORITY to enact and pass all laws and ordinances necessary to preserve the health of the city, and to prevent and remove nuisances," will impose on the city liability for causing or not removing nuisances, to any person who has received special damage therefrom; the exercise of the power conferred being for the public good, and so not merely discretionary, but imperative, and the words "power and authority" in such case meaning duty and obligation. *Mayor etc. of Baltimore v. Marriott*, 326.
10. MUNICIPAL CORPORATION, BY MERE PASSAGE OF ORDINANCE providing for removal of snow and ice from streets, so as to prevent their accumulation from becoming a nuisance, does not thereby discharge itself from the duty imposed by a statute authorizing it to prevent or remove nuisances, but the municipality must, under such statute, make vigorous efforts to enforce such ordinance, in order to bring itself within the saving of having used reasonable care and diligence in removing the nuisance complained of. *Id.*
11. DAMAGES ARE NOT RECOVERABLE FOR INJURY RESULTING FROM NUISANCE unless party suing show reasonable and ordinary care and diligence on his part to avoid the injury. *Id.*

12. INCONVENIENCE OR INJURY RESULTING IN COMMON TO ALL CITIZENS from the same source of complaint is a common nuisance, and the remedy therefrom must be by indictment. *Id.*

OFFICE AND OFFICERS.

1. PRESUMPTION IS THAT ALL SUPERVISORS OF COUNTY, OR AT LEAST QUORUM, WERE PRESENT at the transaction of any business. If the contrary was the fact, it must be affirmatively shown. *Lacey v. Davis*, 524.
2. SIGNATURE OF PRESIDENT OR CLERK OF BOARD OF SUPERVISORS IS NOT NECESSARY TO VALIDITY OF RECORD OF THAT BODY. The law requires that they should keep a record, but does not require that it be signed, and the omission of such signature is at most only an irregularity. *Id.*
See ATTACHMENT, 8; EXECUTIONS; PROCESS; SHERIFFS.

PARENT AND CHILD.

- LAW OF MARRIAGE PERMITTING FEMALE CHILD TO MARRY AFTER AGE OF TWELVE entirely overrides right of parent to services of child, or duties from one to the other as servant and master. *Harvey v. Mesley* 515.

PARTITION.

See CO-TENANT.

PARTNERSHIP.

1. AGREEMENT BY LABORER TO RECEIVE HALF PROFITS IN LAW OF WAGES DOES NOT NECESSARILY CONSTITUTE HIM JOINT OWNER OR PARTNER. Thus a miller employed by mill-owner to care for, tend, and run the mill, and to receive half its profits as compensation, but with no agreement as to any definite time, has no such title or possession as to require him to be joined in an action by the owner for an injury to the mill, and plaintiff can recover the whole damages in his own name. *Chandler v. Howland*, 487.
2. ONE MEMBER OF PARTNERSHIP CANNOT BIND FIRM by an act clearly without the scope of the partnership business. But he has power to bind the firm in all parts of the business in which it is engaged, and in all transactions appertaining to its business. And in all transactions which from their nature appear to the world to be legitimately connected with the business of the partnership, in which they are openly engaged, although in reality they exceed the terms of the partnership, one partner may bind the firm. *Heirn v. McCaughan*, 588.
3. EACH PARTNER HAS COMPLETE JUS DISPONENDI of the whole of the partnership effects. *Woodward v. Cowing*, 211.
4. INDORSEMENT OF NOTE PAYABLE TO FIRM, OR ORDER, BY ONE PARTNER in his individual name, does not authorize the other partner to sue thereon in his own name. *Estabrook v. Smith*, 443.
5. LIABILITY OF PARTNER FOR TORT OF COPARTNER.—One partner is not chargeable with the tort of his copartner, done without his knowledge, when the wrongful act was wholly unconnected with the partnership business, but where it is connected with the business of the firm, and incident to it as the business is carried on, the tort of one partner is considered the joint

and several tort of all, and the partner doing the act is considered as the agent of the other partners. *Heirn v. McCaugham*, 533.

6. PARTNER'S DECLARATIONS ARE EVIDENCE AGAINST CO-PARTNERS in an action against the latter upon a partnership liability. *Fitch v. Swift*, 214.
See CO-TEKANT, 1; EQUITY, 1.

PARTY WALLS.

See BOUNDARIES, 1, 2.

PAWN.

See BAILMENTS, 2.

PERJURY.

See ACTIONS, 4.

PLEADING AND PRACTICE.

1. DEMURRER TO PETITION IS WAIVED BY FILING OF ANSWER BY DEFENDANT. *Smith v. Silence*, 137.
2. OBJECTION TO DECISION ON DEMURRER MUST BE TAKEN AT TIME, and it is too late, on appeal, after amendment of the petition and trial on the merits, to take such objection for the first time. *Foley v. McKeegan*, 107.
3. WHERE REPLICATION DENIES MATTERS CONTAINED IN PLEA, it is error to dismiss the bill without hearing the issue of fact thus raised. *Yost v. Devault*, 92.
4. DEFENDANT HAVING DENIED EACH AVERMENT IN DECLARATION MAY OBJECT TO MAINTENANCE OF ACTION without having filed a demurrer under the practice act, which requires his answer to contain a statement that he demurs, if he wishes to raise an issue of law: See Acts of Mass. 1892, c. 313, secs. 17, 21. *Harvey v. Moseley*, 515.
5. DEFENSES IN AVOIDANCE OF ACTION MUST BE ALLEGED IN ANSWER, under the Massachusetts practice act, Stats. 1892, c. 312, in order to avail the defendant, although first disclosed by the plaintiff's evidence. *Mahy v. Mohawk Valley Ins. Co.*, 380.
6. ISSUE OF FACT RAISED BY PLEADINGS CANNOT BE ADJUDGATED ON MOTION to dismiss the cause. *Conger v. Dean*, 93.
7. COURT IS NOT BOUND TO GIVE IRRELEVANT INSTRUCTIONS, and their relevancy must be affirmatively shown by the party complaining. *Id.*
8. COURT IS NOT BOUND TO GIVE INSTRUCTION WHICH HAS BEEN ONCE GIVEN. *Raver v. Webster*, 96.
9. COURT IS NOT BOUND TO GIVE REQUESTED INSTRUCTION IN PRECISE WORDS of the request. It is sufficient if it be substantially given in any form, so that the jury may not misunderstand the law of the case. *Trent v. Lord*, 298.
10. REQUEST TO STATE LEGAL PROPOSITION HAVING NO CONNECTION WITH PROOF in the case, however correct it may be, may be properly refused by the court. *Id.*
11. INSTRUCTION THAT THERE IS NO EVIDENCE OF FACT SOUGHT TO BE PROVED is proper, where the evidence is so loose and inconclusive that the jury cannot make a legitimate and reasonable inference, and find such fact to be established, without indulging in conjecture and speculation. *Spring Garden etc. Ins. Co. v. Evans*, 303.

12. REFUSAL OF INSTRUCTION ON FACT, OF WHICH NO SUFFICIENT EVIDENCE to warrant a finding by the jury has been introduced, is not error. *Pembecot R. R. Co. v. White*, 257.
13. SUPREME COURT WILL NOT ALLOW PARTY TO BE PREJUDICED by the refusal of the trial court to give a correct instruction, because the same may possibly have been given in instructions which have been lost without his fault. *Abrams v. Foster*, 77.
14. INSTRUCTION IS ERRONEOUS WHERE THERE IS NO EVIDENCE UPON WHICH IT COULD BE PROPERLY PREDICATED, as the only effect it could have would be to suggest to the jury facts which are not in evidence before them. *Heirn v. McCaughan*, 588.
15. SUBMISSION TO JURY OF QUESTIONS OF FACT for a finding, if there is no sufficient evidence of such facts, is erroneous. *Gaither v. Myrick*, 316.
16. INSTRUCTION WHICH ASSUMES EXISTENCE OF FACT is not erroneous when that fact is clearly established by the evidence, where there is no testimony to disprove it, and where it was not contested at the trial in the court below. *Heirn v. McCaughan*, 588.
17. INSTRUCTION THAT "JURY ARE NOT ONLY JUDGES OF FACTS IN CASE, BUT THEY ARE ALSO the judges of the law," is erroneous, that doctrine having been abandoned in this country. *Williams v. State*, 615.
18. PRAYER THAT THERE IS NO EVIDENCE OF WAIVER concedes truth of opposing party's evidence, and all legitimate inferences which may be drawn from it. *Spring Garden etc. Ins. Co. v. Evans*, 306.
19. OBJECTION TO ADMISSION OF TESTIMONY CANNOT BE MADE FOR FIRST TIME in the appellate court. *Dyfolk v. Gorman*, 543.
20. ERRORS OR OMISSIONS NOT PREJUDICIAL ARE NOT GROUND FOR NEW TRIAL. *Lucas v. New Bedford etc. R. R. Co.*, 406.
21. GRANTING OF NEW TRIAL BY DISTRICT COURT IS MATTER OF DISCRETION, and not subject to review by the supreme court. *Dyfolk v. Gorman*, 543.
22. VERDICT WILL BE SET ASIDE FOR ADMISSION OF IMMATERIAL EVIDENCE, when such evidence may have excited prejudices or raised false impressions in the minds of the jury. *Winkley v. Foye*, 715.
23. NONSUIT IS IMPROPER WHERE QUESTION OF FACT ARISES upon the evidence within the province of the jury to decide. *Fickett v. Swift*, 214.
24. GRANTING OF REHEARING DOES NOT IMPORT REVERSAL OF OPINION OF COURT, in Iowa, as it did under the common law. *Morrow v. Weed*, 122.
25. WHENEVER IT APPEARS THAT ACTION CANNOT BE DETERMINED ON ITS MERITS on the record on appeal, it must, under the Maryland act of 1832, be remanded for such further proceedings as the purposes of justice may require. *Campbell v. Lowe*, 339.
26. RECORD ON APPEAL IS CONCLUSIVE IN APPELLATE COURT in regard to a statement appearing therein that a plea of limitations was stricken out because it appeared to the court that it was not filed "on or before the day designated and fixed by the rules of the lower court for the filing of such pleas," if the rules of the court do not appear in the record, and there is an absence of any proof to the contrary. *Kunkel v. Spooner*, 332.
27. PLEA OF LIMITATIONS IS NOT PLEA TO MERITS, and must be filed by the rule day, and is never allowed to be amended. *Id.*
28. NON-PRODUCTION OF PAPERS AFTER NOTICE DULY SERVED will allow proof of their contents by the opposite party, but will have no other legal

effect, nor authorize any inference against the party refusing to produce such papers. *Spring Garden etc. Ins. Co. v. Evans*, 308.

29. PARTY HAVING AFFIRMATIVE OF ISSUE MUST PRODUCE BEST EVIDENCE IN HIS POSSESSION, and failure to produce it, but an attempt instead to sustain the issue by inferior evidence, will authorize the inference that he does not furnish the best evidence because it would tend to defeat, instead of sustaining, the issue on his part. *Id.*

See ACTIONS; CORPORATIONS, 19; CO-TENANCY, 12, 13; CRIMINAL LAW, 7-9; EJECTMENT; EQUITY; JUDGMENTS; NEGOTIABLE INSTRUMENTS, 23, 24; RIPARIAN RIGHTS, 2; STATUTE OF LIMITATIONS, 4, 7; TROVER.

PLEDGE.

See BAILMENTS, 3.

PROBATE COURTS

WHETHER PROBATE COURT IS INFERIOR COURT, *quære*. *Morrow v. Wood*, 122.

PROCESS.

1. MODE IN WHICH WRITS AND PRECEPTS SHALL BE SERVED and executed is regulated by statute, and unless substantially conformable thereto, the doings of the officer are invalid. *Benson v. Smith*, 285.
2. PROCESS REGULAR AND VALID ON ITS FACE, THOUGH ACTUALLY VOID, WILL PROTECT OFFICER OBEYING ITS PRECEPT in accordance with the command of a court or magistrate apparently having jurisdiction of the case or subject-matter. This is founded on reasons of public policy, in order to secure a prompt and effective service of legal process. *Emery v. Hapgood*, 459.
3. STRANGERS, THIRD PERSONS, OR VOLUNTEERS ARE LIABLE IN TRESPASS for interfering, instigating, and causing the enforcement of unlawful process, though it may be regular and valid on its face. Public duty does not require such persons to assume the responsibility of executing legal process. *Id.*
4. SERVICE OF VOID PROCESS IS TRESPASS, for which the magistrate issuing it, and the officer serving it, are answerable. *Barker v. Stetson*, 457.
5. PERSON WHO DOES NO MORE THAN TO PREPARE COMPLAINT TO MAGISTRATE IS NOT LIABLE IN TRESPASS for acts done under the magistrate's process issuing thereon, though the latter have no jurisdiction. *Id.*

See ATTACHMENT; EXECUTIONS; OFFICE AND OFFICERS; SHERIFFS.

PUBLIC LANDS.

1. WHERE ORIGINAL PATENT IS LOST, COPY FROM RECORDS OF GENERAL LAND-OFFICE, certified by the commissioner, under the seal of his office, to be a true copy of the patent records, is admissible without further proof. Such cases are governed by the laws of the United States and the practices of the different departments. *Lacey v. Davis*, 524.
2. ACT OF CONGRESS CONFIRMING APPROVED SURVEY of commons in villages was equivalent to a patent, and conveyed to the city of St. Louis a perfect title to her commons from the government. A claimant seeking to dispossess her, or those claiming under her, of such title, must produce

actual proof of prior cultivation, inhabitation, and possession. *Prima facie* proof of such fact is not sufficient. *Vasquez v. Ewing*, 694.

QUARANTINE.

1. **QUARANTINE STATUTE APPLIES TO VESSELS HAVING OTHER CONTAGIOUS DISEASES** on board as well as to those afflicted with the plague, although formerly only the latter class of vessels were subject to quarantine. *Mitchell v. Rockland*, 252.
2. **HEALTH-OFFICERS CANNOT TAKE POSSESSION AND CONTROL OF VESSELS** in quarantine, to the exclusion of the owners or their agents. *Id.*
3. **CITY IS NOT LIABLE FOR INJURIES TO QUARANTINED VESSEL BY NEGLIGENCE OF HEALTH-OFFICERS**, or their agent or servant, where they have unlawfully taken possession of the vessel. *Id.*

RAILROADS.

1. **ESTABLISHMENT AND POSTING BY PRESIDENT OF CORPORATION OF TARIFF OF FREIGHTS AND FARES ON RAILROAD**, and receipt and appropriation by corporation of fares taken on such tariffs, without objection, raises the legal presumption that the president acted by authority of the corporation in thus fixing and posting such tariffs. *Hilliard v. Gould*, 765.
2. **UNIFORM DISCRIMINATION IN ESTABLISHED RAILROAD TARIFF** of five cents in favor of those passengers who purchase tickets before entering the cars over those who pay after taking seats in the cars is reasonable and just; and a passenger who has neglected to purchase a ticket, and who refuses on the train to pay such additional five cents, may lawfully be ejected from the cars, under a statute authorizing the expulsion of any person refusing to pay the established fare. *Id.*
3. **STATUTE REQUIRING CONDUCTORS ON RAILROADS TO EJECT PASSENGERS FROM TRAIN ON REFUSAL TO PAY** established fare is applicable to all persons properly acting as conductors, without regard to the formality of their appointment or the source of their compensation. *Id.*
4. **IT IS QUESTION FOR JURY WHETHER CONDUCTOR, IN EJECTING PERSON FROM RAILROAD TRAIN**, acted within or in excess of his authority. *Id.*
5. **RAILROAD COMPANY HAS EXCLUSIVE RIGHT TO USE AND ENJOYMENT OF ITS TRACK**, but this right is no greater than that which the owner of the land had before it was acquired by the company; and if such owner had no right, in carrying on his lawful business on his uninclosed land, to destroy his neighbor's beasts found upon it, neither has the railroad company, in conducting its business, any right to destroy such animals, unless the act was unavoidable, after the exercise of all due skill, prudence, and care by the company and its agents. *Vicksburg & Jackson R. R. Co. v. Patton*, 552.
6. **IN MISSISSIPPI, ANIMALS AT LARGE UPON UNFENCED RAILROAD TRACK** are not unlawfully there so as to justify the company in killing them, without using due care, prudence, and skill to avoid their destruction. *Id.*
7. **RAILROAD COMPANY IS BOUND TO KEEP ITS ROAD AND MACHINERY IN GOOD ORDER**, and to have competent and trustworthy servants to manage its engines and cars, and if from its failure to do so the cattle of another, depasturing on its uninclosed track, are injured or killed, the company will be liable in damages to the owner. *Id.*

2. EVIDENCE OF PREVIOUS HABITS AND CONDUCT OF PERSON IN CHARGE OF TRAIN at the time when an accident happened, by which injury was done to the plaintiff's cattle, is admissible in an action to recover for such injury, for the purpose of showing that his alleged misconduct at the time of the injury was in keeping with his general character. *Id.*
3. EXEMPLARY DAMAGES MAY BE ASSESSED AGAINST RAILROAD COMPANY, in an action for killing cattle upon its track, where the evidence shows gross negligence, or a wanton and reckless disposition on the part of its agents to injure or destroy the plaintiff's property. *Id.*

See COMMON CARRIERS; CORPORATIONS.

REALTY.

TENANT FOR LIFE IS NOT BOUND TO RESORT FOR FUEL OR TIMBER, necessarily and properly used on the farm, to outlying lands owned by him, unconnected with and not belonging to the farm. *Webster v. Webster*, 703.

REFEREES.

REFEREE COMPARING ACCOUNT WITH BOOK OF ENTRIES IN ARREAR OF ONE PARTY, the other being present, after the hearing before them has been closed, does not constitute an *ex parte* hearing, where such comparison is not charged to have been fraudulently made, but was in fact made solely to prevent mistake, and the award is not thereby vitiated. *Small v. Trickey*, 255.

See ARBITRATION AND AWARD.

REGISTRATION.

EVERYTHING ESSENTIAL TO TITLE UNDER STATUTE MUST APPEAR OF RECORD. *Benson v. Smith*, 235.

See DEEDS, 1.

RETROSPECTIVE LAWS.

RETROSPECTIVE LEGISLATION IS NOT PROHIBITED BY CONSTITUTION OF UNITED STATES NOR OF KENTUCKY, except in cases affecting or impairing the obligation of contracts. *Railroad Co. v. Dickerson*, 143.

REVERSIONS.

REVERSIONER OF LAND HELD IN DOWER IS OWNER OF GROWING WOOD AND TIMBER THEREON, except enough for use of life estate; has a full right to dispose of it; and when severed, it becomes the personal property of reversioner, who may enter and take it away. *Clark v. Holden*, 450.

RIOT.

1. DETERMINATION OF MAYOR THAT RIOT OR MOB IS THREATENED IS CONCLUSIVE THAT OCCASION EXISTS which authorizes him, under Massachusetts statutes of 1840, c. 92, to call out the volunteer militia to aid the civil authority in suppressing violence and supporting the laws; and the question cannot be inquired into in an action for personal injuries inflicted by the militia. *Ma v. Smith*, 356.
2. CIVIL OFFICER INCURS NO LIABILITY IN ISSUING PRECEPT BY WHICH MILITIA IS CALLED OUT, when he is vested with the power of determining

whether an occasion exists therefor, and his determination has been rightly exercised within the limits of the authority conferred by law. *Id.*

3. **PRECEPT OF CIVIL OFFICER CALLING OUT MILITIA AFFORDS COMPLETE JUSTIFICATION** to all those bound to obey its command, for acts done by them in pursuance thereof, when issued within the limits of the authority conferred by law, and in exact conformity to the terms of the statute. *Id.*
4. **AUTHORITY TO CALL OUT MILITIA FOR PARTICULAR PURPOSE CARRIES WITH IT**, by necessary and reasonable implication, the authority to employ them to effect that object, and to issue all proper orders and use all reasonable means therefor. *Id.*
5. **MAYOR HAS AUTHORITY TO ORDER VOLUNTEER MILITIA CALLED OUT BY HIM**, under Massachusetts statutes of 1840, c. 92, to repair from the place assembled to any designated portion of the city and there perform any specific duty in suppressing violence and supporting the laws. *Id.*
6. **MILITIA HAS NO POWER TO ACT INDEPENDENTLY OF CIVIL AUTHORITY**, under Massachusetts statutes of 1840, c. 92, when assembled under a precept of a civil officer to aid in suppressing violence and supporting the laws; nor can such officer delegate his authority to the military authorities, or vest in them discretionary power to take any steps or do any act to prevent or suppress a mob or riot. *Id.*
7. **POWER TO CALL OUT MILITIA TO REPRESS AND PREVENT ANTICIPATED RIOT CANNOT BE MADE TO DEPEND**, in any degree, upon the cause of such threatened disturbance: the cause may be the enforcement of an unconstitutional law. *Id.*
8. **UNITED STATES MARSHAL DOES NOT RENDER HIMSELF LIABLE FOR ACTS DONE BY MILITIA** by requesting that they be called out to prevent a riot from the service of process of the United States, which he intended to execute and did execute without such military aid, and by giving assurances that the expenses incurred by calling out the militia would be paid by the president of the United States. *Id.*
9. **OFFICERS ARE NOT LIABLE FOR UNLAWFUL ACTS OF MILITIA**, done without authority, and not coming within the fair scope of the orders given by them. *Id.*

RIPARIAN RIGHTS.

1. **RIGHTS OF RIPARIAN PROPRIETORS.**—Owner of upper mill on a stream must so use the water that every riparian proprietor below shall have the enjoyment and use of it substantially according to its natural flow, subject to such interruption as is necessary and unavoidable by the reasonable and proper use of the mill privilege above. *Chandler v. Howland*, 487.
2. **INSTRUCTIONS RELATIVE TO RIPARIAN RIGHTS.**—In action by owner of mill on stream against owner of mill above, built after the former, for disturbing flow of the water, it is not error to instruct the jury that defendant is not responsible in damages for the proper exercise of a mill privilege above; that he is responsible for the unreasonable use or unreasonable detention of the water; and that he must permit it to run to plaintiff's mill as he was accustomed to have it under the natural flow, "subject to those slight and substantially immaterial obstructions and retardations which necessarily result from exercising the right of a mill privilege above." *Id.*

See WATERCOURSES.

SALES.

1. **PURCHASER OF STOCK OF GOODS GENERALLY, UPON CONDITION THAT NO TITLE SHALL VEST IN HIM** until payment of price, can transfer no title as against vendor until performance of condition; and vendor's delay of eight months in enforcing his rights against a second purchaser will not prejudice his case. *Barbant v. Crocker*, 470.
 2. **ORIGINAL VENDOR, AFTER NOTICE TO SECOND PURCHASER THAT HE OWES PART OF GOODS**, may maintain an action against him for a return of the goods, or their value, without more particularly designating the articles claimed by him, where the goods have been sold to the first purchaser upon condition that no title should vest in him until payment of the purchase price. *Id.*
 3. **SALE AND DELIVERY OF GOODS, ON CONDITION THAT TITLE SHALL NOT VEST IN VENDOR** until payment of price, passes no title until condition is performed; and vendor, if guilty of no laches, may reclaim the property, even from one who has purchased from his vendee in good faith and without notice. *Id.*
 4. **CONDITIONAL SALE AND DELIVERY OF CHATTELS PASSES NO TITLE UNTIL CONDITIONS ARE PERFORMED**, although the vendor knew the purchaser was a dealer, and had no use for the chattels except for resale; and a party who purchases the chattels in good faith from the vendee acquires no right thereto as against the original vendor, if no laches can be imputed to the latter in asserting his claim. *Sargent v. Metcalf*, 368.
 5. **WAIVER OF CONDITIONS OF SALE AS TO PRICE IS NOT AFFECTED** by asking for and being promised security for payment, no security in fact ever having been given. *Id.*
 6. **VENDOR OF PROPERTY HAS LIEN ON IT FOR PRICE**, where it is sold on a credit, and remains in his hands, and the vendee is only entitled to the possession upon payment or tender of the price. *Merchants' etc. Bank v. Hewitt*, 49.
- See ESTATES OF DECEDENTS, 1, 2, 4; EXECUTORS AND ADMINISTRATORS, 6-8; JUDICIAL SALES.

SHERIFFS.

- POWER OF SHERIFFS AND THEIR DEPUTIES TO SERVE AND EXECUTE WRITS** and precepts directed and committed to them is statutory, and unless conferred by the statute expressly or by fair implication, it does not exist. *Benson v. Smith*, 285.
- See ATTACHMENT; EXECUTIONS, 6-10; PROCESS.

SHIPPING.

1. **REGISTER OF VESSEL IS NOT EVIDENCE OF TITLE**, even against the person named in it as owner, without extraneous proof that it was made with his authority or assent, and even then is not conclusive; and it is not evidence in his favor at all, being nothing more than his declaration. *Bradbury v. Johnson*, 264.
2. **PROPERTY IN VESSEL FOLLOWS KEEL**, and if one repairs his vessel with another's materials, the property in her remains in him. *Perkins v. Pitts*, 267.

2. **MECHANICS AND MATERIAL-MEN HAVE, BY GENERAL MARITIME LAW, LIEN** on foreign vessels for the price of their labor and materials, but not on domestic vessels. *Id.*
3. **STATUTES OF MAINE GIVE LIEN ON ALL VESSELS** to those who perform labor or furnish materials for or on account of the building or repair thereof for their wages or materials, which lien may be secured by an attachment of the vessel within four days after she is launched, or such repairs are completed. *Id.*
4. **MATERIAL-MAN'S LIEN ON VESSEL EXTENDS ONLY TO MATERIALS USED** in her construction or repair, and not to such as are promised and agreed to be so used. *Id.*
5. **LIEN ON VESSEL IS NOT SECURED BY ATTACHMENT** made under a writ which simply commands the officer to attach the goods and estate of the defendant therein named, without anything indicating a lien claim. Such an attachment gives the plaintiff no special or peculiar rights by reason of any materials he may have furnished, but he stands on the same footing as any other creditor, and his rights must be postponed to those of a prior mortgagee of the vessel. *Id.*
6. **AGREEMENT TO FORBEAR TO ENFORCE LIEN IN ADMIRALTY IS SUFFICIENT** CONSIDERATION for a promise by one of the owners of the ship to pay the claim should a libel then about to be brought against the ship on a similar claim be sustained. *Fish v. Thomas*, 348.
7. **VERBAL PROMISE BY ONE OF OWNERS OF SHIP TO PAY CLAIM FOR LABOR AND MATERIALS** furnished in her construction to the builder, provided a libel then about to be brought on a similar claim should be sustained in admiralty, is not a promise to answer for the debt of another, within the statute of frauds. *Id.*
8. **DEFENDANT IS ESTOPPED FROM DENYING THAT PLAINTIFFS HAD LIEN ON SHIP**, where the parties agreed that they should abide the decision of a court of competent jurisdiction in a case then pending which established a similar claim. *Id.*
9. **CARGO MUST BE CARRIED ACCORDING TO PROJECTED VOYAGE** by use of every reasonable and practicable method, and the master and owners will be responsible for every act not strictly in furtherance of this duty. *Gaither v. Myrick*, 316.
10. **RIGHT TO HAVE CARGO CARRIED AND DELIVERED ACCORDING TO PROJECTED VOYAGE** is superior to power to sell vessel, and a claim for damages for a sale of the vessel before delivery of the cargo is not affected by the fact that the shipper knew that the vessel might possibly be sold. *Id.*
11. **ACT OF MASTER OF VESSEL IN SUBJECTING CARGO TO RISK OF BEING TAKEN AND CONDEMNED** under the local laws of the port of discharge is not a ground for the recovery of damages against him, in the absence of proof that the cargo was so taken, or that any loss resulted therefrom. *Id.*
12. **CARGO LANDED BEFORE SALE AND BEFORE REACHING PORT OF DESTINATION** will impose on master of vessel liability for charges of landing and reshipment to port of destination, and shipper will not be liable therefor. *Id.*
13. **NECESSITY TO JUSTIFY SALE OF CARGO AND SHIP BEFORE ARRIVING AT PORT OF DESTINATION** must be such a necessity as supersedes all human

laws, and a sale by the master without such necessity will render him and the owners liable to the shipper. *Id.*

15. WHERE CONTINUANCE OF VOYAGE TO PORT OF DESTINATION IS IMPRACTICABLE, master should if possible transship goods to such port, but if this cannot be done, a return or safe deposit may be made, and if possible the shipper consulted; and in any case, the master should do that which would be most conducive to the interest of all concerned. *Id.*
16. PROVISION IN CONTRACT OF AFFREIGHTMENT FOR TRANSPORTATION OF CARGO "to Valparaiso and a market," authorizes the ship to visit such other ports beyond the named port as may be deemed expedient by the master and supercargo, in the exercise of a sound discretion, and imposes on the ship the carriage of the goods until a market is found, or the goods left on deposit for sale, under circumstances of necessity authorizing a departure from the original contract; but such provision does not impose on the supercargo the duty of selling at the first or any other port, if he has reason to believe that he will find a better market by going farther, and acts in good faith. *Id.*

See INSURANCE, 10, 11; SUPERCARGOES.

SLANDER.

1. TO MAINTAIN ACTION OF SLANDER, CONSEQUENCE OF WORDS SPOKEN must be to occasion some injury or loss to the plaintiff, either in law or fact. *Abrams v. Peckee*, 77.
2. ACCUSATION IS ACTIONABLE WHEN, IF PROVED, WOULD SUBJECT PARTY FALSELY ACCUSED to a punishment which would bring disgrace upon him. *Id.*
3. TO CHARGE PERSON WITH CAUSING OR PROCURING ABORTION is not actionable *per se*, when there is no law punishing such act at the time of the speaking of the words. *Id.*
4. CALLING WOMAN WHORE IS ACTIONABLE of itself, without proof of special damage. *Smith v. Silence*, 137.
5. REPETITION OF SLANDEROUS REPORT ALREADY IN CIRCULATION IS ACTIONABLE, although it was not repeated with any design to extend its circulation, or confirm it, or cause the person to whom addressed to believe it to be true. *Kenney v. McLaughlin*, 345.

See LABEL.

SOVEREIGNTY.

- RIGHTS WHICH ARE PART OF STATE SOVEREIGNTY, CONFERRED FOR PUBLIC GOOD, cannot be lost by disclaim. *Trent v. Lord*, 296.

See STATUTE OF LIMITATIONS, 2.

SPECIFIC PERFORMANCE.

1. COURT OF EQUITY WILL NOT DECREE SPECIFIC PERFORMANCE EXCEPT in cases where it would be strictly equitable to make such a decree. *Johson v. Hubbell*, 773.
2. SPECIFIC PERFORMANCE CANNOT BE DEMANDED AS MATTER OF RIGHT. It is a matter of discretion in the court which withholds or grants relief, according to the circumstances of each particular case, where the general rules and principles governing the court do not furnish any exact measure of justice between the parties. *Id.*

2. SPECIFIC PERFORMANCE OF PAROL AGREEMENT WILL BE COMPELLED by a court of equity, where one party to it has wholly or partially performed it on his part, so that its non-fulfillment by the other party is a fraud. *Id.*
4. SPECIFIC PERFORMANCE OF AGREEMENT TO MAKE PARTICULAR DISPOSITION OF PROPERTY BY WILL will be decreed by a court of equity, upon the recognised principles governing it in the exercise of this branch of its jurisdiction. *Id.*
5. VENDOR AS WELL AS VENDEE MAY INVOKE POWER OF COURT OF EQUITY to enforce specific performance of contract for the sale of land. *Old Colony R. R. Corp. v. Evans, 394.*
6. VENDOR'S RIGHT TO SPECIFIC PERFORMANCE OF CONTRACT OF SALE OF LAND is not defeated on the ground that he has an adequate remedy at law, since the measure of damages at law is not the contract price, but only the difference between this and the market value of the land at the time of the breach of the contract. *Id.*
7. SPECIFIC PERFORMANCE WILL NOT BE DECREED IN CASES OF FRAUD, or of hard or unconscionable bargains, or where the decree would produce manifest injustice. *Id.*
8. MUTUAL MISTAKE AS TO QUALITY OF LAND FROM WHICH DEFENDANT HAS UNDERTAKEN TO DIG GRAVEL for plaintiff's benefit is not ground for dismissing a bill for the specific performance of another and subsequent contract made after the defendant knew of the character of the land, and by which other land was substituted, and the defendant agreed to pay for the first land. *Id.*

STATUTES.

1. CONSTITUTIONALITY OF STATUTE CANNOT BE ATTACKED BY INTRODUCING JOURNALS OF LEGISLATURE as evidence to contradict the statute roll. *Pacific R. R. v. The Governor, 673.*
2. LEGISLATURE MAY PROVIDE MODE BY STATUTE FOR AUTHENTICATION OF LAWS returned to the legislature by the governor without his signature, and after reconsideration passed by both houses, when the constitution is silent as to the mode by which such laws shall be authenticated. *Id.*
3. COURTS MAY PASS UPON VALIDITY OF LAWS, judging them by the standard of the state constitution, when the legislature exceeds its powers in their enactment. *Id.*
4. LEGISLATIVE JOURNALS ARE NOT RECORDS: they are of no validity after an act has passed the legislature. *Id.*
5. STATUTE ROLL IS ONLY ABSOLUTE AND CONCLUSIVE PROOF OF STATUTES; this record imports absolute verity, and cannot be contradicted. *Id.*
See CONSTITUTIONAL LAW; EX POST FACTO LAWS.

STATUTE OF FRAUDS.

1. STATUTE OF FRAUDS IS SATISFIED BY WRITING SIGNED BY PARTY TO BE CHARGED, though not signed by the other party. *Old Colony R. R. Corp. v. Evans, 394.*
2. ONE MAY ENFORCE WRITTEN CONTRACT SIGNED BY DEFENDANT ALONE, though he himself might avoid liability, under such contract, by reason of the statute of frauds. *Id.*
3. CONTRACT WITHIN STATUTE OF FRAUDS IS NOT OPEN TO OBJECTION OF WANT OF MUTUALITY, where the assent of both parties is shown, though

- the assent of only one party is in writing, and consequently the contract can be enforced against him alone. *Id.*
4. CONTRACT IS NOT WITHIN STATUTE OF FRAUDS if by its terms, or by reasonable construction, it can be fully performed within a year, although it can only be done by the occurrence of some contingency, as death, by no means likely to happen. *Blanding v. Sargent*, 720.
 5. CONTRACT IS NOT WITHIN STATUTE OF FRAUDS if the agreement on one side can be performed within a year, and is so performed, although the agreement on the other side is impossible to be performed within that time. *Id.*
 6. CONTRACT IS WITHIN STATUTE OF FRAUDS WHICH IS FOR DELIVERY, AND NOT MANUFACTURE and delivery, of certain articles, such contract being a contract of sale. *Fickett v. Swift*, 214.
 7. PAROL CONTRACT IS VOID, AS BEING CONTRARY TO STATUTE OF FRAUDS, when such contract provides that future advances made by E. to C. shall operate as an equitable lien or mortgage on the land of C., the title to which is in E. *Curie's Heirs etc. v. Eddy*, 699.
 8. VERBAL AGREEMENT BETWEEN C. AND E. FOR E. TO HOLD LAND AS SECURITY FOR FUTURE ADVANCES, made by E. to C., is within the statute of frauds, and void. *Id.*
 9. DEED OF LAND SIGNED BY VENDOR AND KEPT IN HIS POSSESSION without delivery to the vendee, is not a sufficient memorandum of the contract to satisfy the statute of frauds. *Johnson v. Brook*, 547.
 10. WHERE HUSBAND AND WIFE AGREE TO CONVEY THEIR INTEREST in a tract of land, a deed thereof executed by the husband alone is not a complete memorandum of the contract, and is insufficient under the statute of frauds. *Id.*
 11. PART PERFORMANCE OF PAROL AGREEMENT to make a particular disposition of property by will takes it out of the statute of frauds. *Johnson v. Hubbell*, 773.
 12. PAROL AGREEMENT BETWEEN PARTIES TO ACTION OF EJECTMENT THAT JUDGMENT BE ENTERED therein for the plaintiff for the whole of the premises sued for, but that execution thereon be restricted to that part to which his title was conceded to extend, is not a contract for the sale or conveyance of land, and is not within the statute of frauds. *City of Natchez v. Vanderveelde*, 581.
 13. PAROL AGREEMENT BETWEEN PARTIES CLAIMING TITLE TO ADJOINING LANDS that each shall take and hold possession of specific parts, with possession delivered under such agreement, is in effect a settlement of the claims of the parties to the parts of the lands to which they are respectively entitled, and a surrender of all claim to any other part than that agreed to belong to each, and is not distinguishable in principle from a parol partition of lands between parties in possession and claiming title accompanied and followed by possession by each party of the part conceded to him. Such an agreement is valid and binding upon the parties, and is not within the statute of frauds. *Id.*

STATUTE OF LIMITATIONS.

1. WHERE THERE IS REMEDY BOTH AT LAW AND IN EQUITY, STATUTE OF LIMITATIONS APPLIES EQUALLY TO BOTH. *Lexington Life etc. Ins. Co. v. Page*, 185.

2. SECTION 1506 OF IOWA CODE IS NOT GENERAL STATUTE OF LIMITATIONS, and does not apply to sales made prior to its enactment; its application is limited to causes arising under chapter 88 of the code. *Cooper v. Sunderland*, 52.
3. RIGHT OF FEMES COVERT AND OF INFANTS AS EQUITABLE OWNERS of property, the legal title to which is vested in trustees, is not barred by the failure of the trustees to institute a suit for its recovery until after the lapse of the period prescribed by the statute of limitations. *Fearn v. Shirley and Wife*, 575.
4. GENERAL DEMURRER TO BILL, SETTING UP STATUTE OF LIMITATIONS, ought not to be sustained where there are several complainants who are shown to be infants, and another whose disability is not distinctly shown. *Id.*
5. RIGHT TO FORECLOSE MORTGAGE IS NOT BARRED BY SAME LAPSE OF TIME which bars an action upon the note secured by the mortgage. *Nesitt v. Bacon*, 609.
6. STATUTE OF LIMITATIONS COMMENCES TO RUN AGAINST MORTGAGE FROM TIME RIGHT TO FORECLOSE ACCRUES, and that period of time which would bar an action at law to recover possession of the mortgaged property, after condition broken, will bar a bill for foreclosure in equity, unless there be circumstances shown sufficient to take the case out of the bar of the statute. *Id.*
7. DEMURRER TO BILL WHICH ALLEGES THAT CERTAIN DEBTS ARE DUE AND UNPAID, upon the ground that they are barred by the statute of limitations, does not admit the non-payment of such debts to the extent of rebutting the presumption of satisfaction created by the statute. The demurrer in such a case is equivalent to a plea of the statute. The defense set up is not the presumption on which the statute is founded, but the bar created by its positive provisions. *Id.*
8. PARTY CANNOT DEDUCT FROM PERIOD OF STATUTE OF LIMITATIONS applicable to his case the time consumed by the pendency of an action in which he sought to have said matter adjudicated, but which was dismissed without prejudice as to him. *Id.*
9. MAXIM, NULLUM TEMPUS OCCURRIT REGI, APPLIES ONLY TO STATE at large, and not to its political subdivisions. *County of St. Charles v. Powell*, 637.
10. STATUTE OF LIMITATIONS RUNS AGAINST COUNTY on loan of money made by the county to a private person, although the money loaned had been donated by the state to the county for the purpose of local improvement. And the fact that the borrower was, for a part of the period of limitation, a judge of the county court will not prevent him from setting up the statute of limitations as a defense. *Id.*
11. WHERE RIGHT OF ACTION IS IN CORPORATION, and the statute of limitations is a complete bar against it, the bar is also complete against the creditors of the corporation. *Lexington Life etc. Ins. Co. v. Page*, 165.
12. WILLFUL IGNORANCE, OR THAT WHICH RESULTS FROM NEGLIGENCE and want of that degree of vigilance which the law requires, will not prevent the operation of the statute of limitations. *Id.*

See JUDGMENTS, 4; TRUSTS AND TRUSTEES, 6, 7.

SUPERCARGOES.

1. MASTER WHO IS PART OWNER AND SUPERCARGO IS LIABLE FOR INJURY TO CARGO, resulting from sale of the vessel before the cargo is landed, and

when landing it before a sale was effected or storage obtained, in order to deliver the vessel in compliance with the contract of sale. *Gasker v. Myrick*, 316.

2. SUPERCARGOES ARE BOUND BY PRINCIPLES WHICH REGULATE CONDUCT OF FACTORS ABROAD, and are liable for injuries to the employer caused by want of reasonable skill or ordinary diligence. *Id.*
3. TERM "REASONABLE SKILL" IMPORTS SUCH SKILL AS IS ORDINARILY POSSESSED and employed by persons of common capacity engaged in the same trade. *Id.*
4. ORDINARY DILIGENCE MEANS THAT DEGREE OF CARE which persons of common prudence are accustomed to use in the conduct of their own business. *Id.*
5. SUPERCARGOES MUST ACT IN GOOD FAITH AND EXERCISE proper judgment in their transactions in that capacity. *Id.*
6. SUPERCARGO HAVING VENTURE OF HIS OWN IN SAME VESSEL must exercise as much diligence and care about his factorage transactions as he does about his own venture. *Id.*
7. SUPERCARGO IS CHARGEABLE WITH NEGLIGENCE in making sale without proper inquiry, where he has had notice sufficient to put a person of prudence on his guard. *Id.*
8. SUPERCARGOES CANNOT GENERALLY DELEGATE THEIR AUTHORITY, but the necessity of the case, the usages of trade, or the law and custom of the country where the agency is to be executed, may at times give rise to exceptions to this rule. *Id.*
9. DUTIES AND LIABILITIES OF MASTER OF VESSEL, who is also consignee of the cargo, are as separate and distinct as to each capacity as if confided to different persons. *Id.*
10. MASTER OF VESSEL, WHO ALSO ACTS IN CAPACITY OF SUPERCARGO with knowledge of the shipper, cannot wholly abandon his duty in the former capacity to discharge that of the latter; but he must act in both as far as possible, with reference to the respective interests of his principal in each capacity. *Id.*
11. SUPERCARGO WHO ABANDONS HIS TRUST OR DELEGATES HIS AGENCY, merely because the cargo could not be disposed of at one of the ports reached prior to the port of destination, is guilty of a violation of duty, and liable therefor. *Id.*
12. SUPERCARGO IS NOT LIABLE IN DAMAGES because another party, wrongfully and without his privity, assumes authority to sell and does sell the cargo. *Id.*

SURETYSHIP.

VERBAL PROMISE TO PAY DEBT OF ANOTHER IF HE DOES NOT PAY IT is not an original undertaking, but a collateral one, within the statute of frauds. *Dyott v. Gorman*, 543.

See JUDGMENTS, 3; NEGOTIABLE INSTRUMENTS, 9, 12.

TAXATION.

1. LEGISLATURE CANNOT AUTHORIZE MUNICIPAL CORPORATION TO TAX, for its own local purposes, lands lying beyond the corporate limits. *Wells v. City of Weston*, 627.
2. ASSESSMENT ROLL NEED NOT BE SIGNED, UNDER LAW OF 1842. The signature of the assessor to his certificate attached thereto is sufficient. *Lacey v. Davis*, 524.

3. WHERE LAW REQUIRES BOARD OF SUPERVISORS IN PROPER CASE TO EQUALIZE ASSESSMENTS, and no record of such equalization exists, the presumption is that no cause existed requiring it. *Id.*
4. ADDITION OF TEN PER CENT TO ALL TAXES BECOMING DELINQUENT, being done by virtue of a statute authorizing such addition, cannot be objected to as excessive. *Id.*
5. SALE OF LAND FOR TAXES, PART OF WHICH WERE ILLEGAL, IS VOID IN ACTION OF EJECTMENT, where the validity of the sale depends upon the validity of the tax and subsequent proceedings. In personal actions against the collector it is different. If the illegal part can be separated, it alone is rejected. *Id.*
6. LAW, BY MAKING TAX DEEDS PRIMA FACIE EVIDENCE OF REGULARITY OF ALL PROCEEDINGS up to their date, shifted the burden of proof from the holder of the title to the adverse party. To invalidate the deed, or to throw the burden upon the former, the latter must show irregularities of such a nature as to require explanation or counter-proof; they must be of matters which are peremptory, and not directory. It is not sufficient to cast a general doubt over the title, but it is necessary to point out some specific defect, or raise a reasonable presumption against the sufficiency of some specific act, or of the non-performance of some necessary duty. *Id.*
7. PURCHASE OF PROPERTY, AT TAX SALE THEREOF, BY ONE IN POSSESSION.— One in possession of property as a trespasser, or under color of title, by suffering the same to be sold for taxes and becoming a purchaser at such sale, acquires no additional title. Every act of his which is in obedience to a law imposing such burden upon the land must be regarded as done by him by reason of his own claim of title, and in protection thereof; and he cannot thereby acquire a new or superior title, as every such act is deemed to be subordinate to his own title. That such taxes were a lien upon the land, at the time of his entry thereon, makes no difference, nor does it matter in whose name the property was assessed. *Id.*
8. SUCCESSIVE PURCHASES OF SAME PROPERTY, AT DIFFERENT SALES THEREOF, FOR DELINQUENT TAXES, do not operate to strengthen the title first acquired. *Id.*
9. UNDER STATUTE WHICH REQUIRED SALE OF LAND FOR TAXES TO BE MADE ON FIRST MONDAY IN MONTH, and to be continued from day to day until the amount has been realized, a deed which recites that the sale took place on the eleventh of the month is not invalid, nor does such recital throw the burden of proof upon the defendant. The law may have been complied with, and it is for the plaintiff to show that it was not. *Id.*

TORTS.

See EMINENT DOMAIN, 9, 10; PARTNERSHIP, 5.

TRESPASS.

See ANIMALS, 2; PROCESS, 3-5.

TROVER.

To MAINTAIN TROVER, PLAINTIFF MUST PROVE PROPERTY IN HIMSELF and the right of immediate possession. *Ames v. Palmer*, 271.

TRUSTS AND TRUSTEES.

1. **BENEFICIARIES UNDER TRUST DEED MAY MAINTAIN ACTION FOR ENFORCEMENT OF TRUST** and the recovery of that portion of the trust funds to which they may be entitled. *Lexington Life etc. Ins. Co. v. Page*, 165.
2. **RIGHT OF PLAINTIFFS TO SEEK ADVICE AND DIRECTION OF COURT IN PERFORMANCE OF THEIR DUTIES AS TRUSTEES** is not dependent on defendants' acts and proceedings, whether legal or illegal. It is not necessary that defendants should be made parties, or that any decree be entered against them if they are so made. *Trenchell v. Salisbury Mfg. Co.*, 490.
3. **IF PLAINTIFFS STATE CASE ENTITLING THEM TO AID AND ADVICE OF COURT IN PERFORMANCE OF THEIR DUTIES AS TRUSTEES**, a suitable decree may be entered to fully meet this part of the prayer of the bill, without any inquiry concerning the legality of the acts or proceedings of a corporate defendant. *Id.*
4. **COURT OF CHANCERY HAS GENERAL POWER AND AUTHORITY TO ENTERTAIN JURISDICTION OF CASES IN WHICH TRUSTEES ASK FOR PROTECTION** in the performance of their duties; but the cases which fall under this head of equity are those in which there are conflicting claims to the trust estate, or it is doubtful, upon the construction of the will, deed, or other instrument creating the trust, to whom the property, or the beneficial interest in it, belongs. *Id.*
5. **BILL IN EQUITY CANNOT BE MAINTAINED BY TRUSTEES WHO ARE STOCKHOLDERS IN CORPORATION**, under a claim for protection and advice in the execution of their trusts, and thereby subject the corporation, and all their acts and proceedings, to the jurisdiction of a court of chancery. *Id.*
6. **EXPRESS AND CONTINUING TRUSTS ARE WITHIN EXCLUSIVE JURISDICTION** of courts of equity, and are not affected by the statute of limitations. *Lexington Life etc. Ins. Co. v. Page*, 165.
7. **IMPLIED TRUSTS ARE COGNIZABLE IN COURTS OF LAW**, and are not exempted from the operation of the statute of limitations. *Id.*
See ASSIGNMENTS, 3; PLEADING AND PRACTICE, 26.

USAGES.

See FIXTURES, 2.

USURY.

AGREEMENT TO PAY SUM OF MONEY BY DAY CERTAIN, AND MORE THAN LEGAL INTEREST afterwards by way of penalty if the debt be not punctually paid, is not usurious. *Gower v. Carter*, 71.

VENDOR AND VENDEE.

1. **DISTRICT COURT OF UNITED STATES HAS JURISDICTION TO RENDER JUDGMENT OF EVICTION** against a remote vendor with notice of suit, and in favor of a remote vendee with special warranty. The vendor is concluded by judgment in such case. *Hunt v. Orwig*, 144.
2. **VENDOR CANNOT, IN ACTION BETWEEN HIMSELF AND REMOTE VENDEE**, impeach the consideration expressed in his deed to his immediate vendee.

in order to lessen the amount of recovery; nor can he in such action avail himself of fraud practiced upon him by his vendee. *Id.*

See SPECIFIC PERFORMANCE, 5, 9.

WAIVER.

WAIVER IS QUESTION OF LAW, AND NOT OF FACT. *Spring Garden etc. Ins. Co. v. Evans*, 308.

WAREHOUSEMEN.

IOWA CODE, SECTION 949, AUTHORIZES ASSIGNOR OF WAREHOUSE RECEIPT, by which the maker promises to deliver a certain quantity of corn, to sue in his own name, subject, however, to any defense or set-off, legal or equitable, which the maker had against the assignor, before notice of the assignment. *Merchants' etc. Bank v. Hewitt*, 49.

See NEGOTIABLE INSTRUMENTS, 1, 2.

WARRANTY.

See COVENANTS.

WASTE.

1. WHAT IS WASTE.—Cutting timber and other wood on wood and timber land held by tenant for life, and for purposes other than the use of the estate, is waste; although the object is to restore the land to pasture, as it originally was when the life estate commenced; and although it might have been good husbandry in an owner of the fee to have so restored it. *Clark v. Holden*, 450.
2. WHAT IS NOT WASTE.—Changing estate from pasture to woodland by tenant in dower, in suffering wood to grow up on land which was pasture before, is not waste. *Id.*
3. TENANT FOR LIFE HAS NO RIGHT TO COMMIT WASTE UNDER RESERVATION of "all the right, title, and interest in and unto the above-named land and premises for and during my natural life." *Webster v. Webster*, 705.
4. EVIDENCE IS NOT COMPETENT ON QUESTION OF WASTE of the practice of the tenant for life in using the land when he was the owner in fee-simple. *Id.*

WATERCOURSES.

1. CONVEYANCE BY STATE OF ALL ITS RIGHT, TITLE, AND INTEREST in and to the land over which a stream passes does not convey to the grantee any exclusive right of property in the easement for the passage of logs upon the stream, and does not authorize him, nor those claiming under him, to use exclusively, or to destroy, the public easement existing upon the stream at the date of its execution. *Treat v. Lord*, 298.
2. STATUTES RELATING TO RIGHT OF ERECTING MILLS AND DAMS do not excuse or justify the erection of a dam in such a manner as to interrupt or destroy the public easement or right of way in the stream upon which it is built. *Id.*
3. PUBLIC EASEMENT EXISTS IN STREAM which is inherently and in its nature capable of being used for the purposes of commerce, for the floating of vessels, boats, rafts, or logs, leaving to the owner of the soil all other modes of use not inconsistent with the easement. *Id.*

4. **NO ACCIDENTAL OR INTENTIONAL OBSTRUCTIONS IN STREAM**, which were not there in its natural state, will take from it its inherent and natural capability of being used as a passage-way for the purposes of commerce. *Id.*
5. **PUBLIC MAY USE STREAM FOR FLOATING LOGS**, notwithstanding it may sometimes be necessary to go upon its banks to effect such floating; such incidental necessity neither enlarges nor diminishes the natural capacity of the stream, nor in any way affects its public character. *Id.*
6. **STREAM SO SMALL AND SHOAL THAT NO LOGS CAN BE DRIVEN IN IT**, without being propelled by persons traveling on its banks, is private property, and not subject to any public servitude for the passage of logs. *Id.*
7. **PUBLIC EASEMENT IN STREAM, FOR PASSAGE OF LOGS, MAY BE CONTROLLED**, abridged, or even destroyed, by the state by virtue of its sovereignty or right of eminent domain, disconnected from and not dependant upon its ownership of the soil; but until such power has been exercised by positive legislation, all persons may lawfully enjoy such easement in common with the state. *Id.*
8. **NAVIGATOR MAY MOOR HIS VESSEL TO TREE UPON VACANT SHORE** without being deemed guilty of a wrong, though done for convenience only, and not to avoid impending danger; and under circumstances of danger incident to navigation, he may moor his vessel to a private shore, using such caution to avoid injury to others as circumstances will allow, and being responsible only for such damage as may arise to another from his own positive acts or from want of proper skill or care. *Morrison v. Thurman*, 153.
9. **NAVIGABLE RIVER, AT EVERY STAGE OF WATER, IS FREE TO PUBLIC FOR PURPOSES OF NAVIGATION** and its incidents; and the owners of land along its banks can acquire no right to the use of the river inconsistent with the public right. *Id.*
10. **CASUALTY IN NAVIGATING VESSEL NOT EXPLOITED, AND FOR WHICH NO BLAME IS ATTRIBUTABLE TO PARTY OR HIS AGENT**, is neither cause of action for damages nor ground for enhancing damages for an entry on another's land; and in such case, damages can be recovered only for subsequent loss after the obstruction which caused the accident might have been removed by the use of ordinary care. *Id.*

See **RIPARIAN RIGHTS**.

WILLS.

1. **ONE MAY MAKE VALID AGREEMENT BINDING HIMSELF** legally to make a particular disposition of his property by last will and testament. *Johnson v. Hubbell*, 772.
2. **COURT OF EQUITY HAS NO POWER TO REFORM WILL** by correcting a mistake therein made by the draughtsman in drawing it. *Goods v. Goods*, 636.

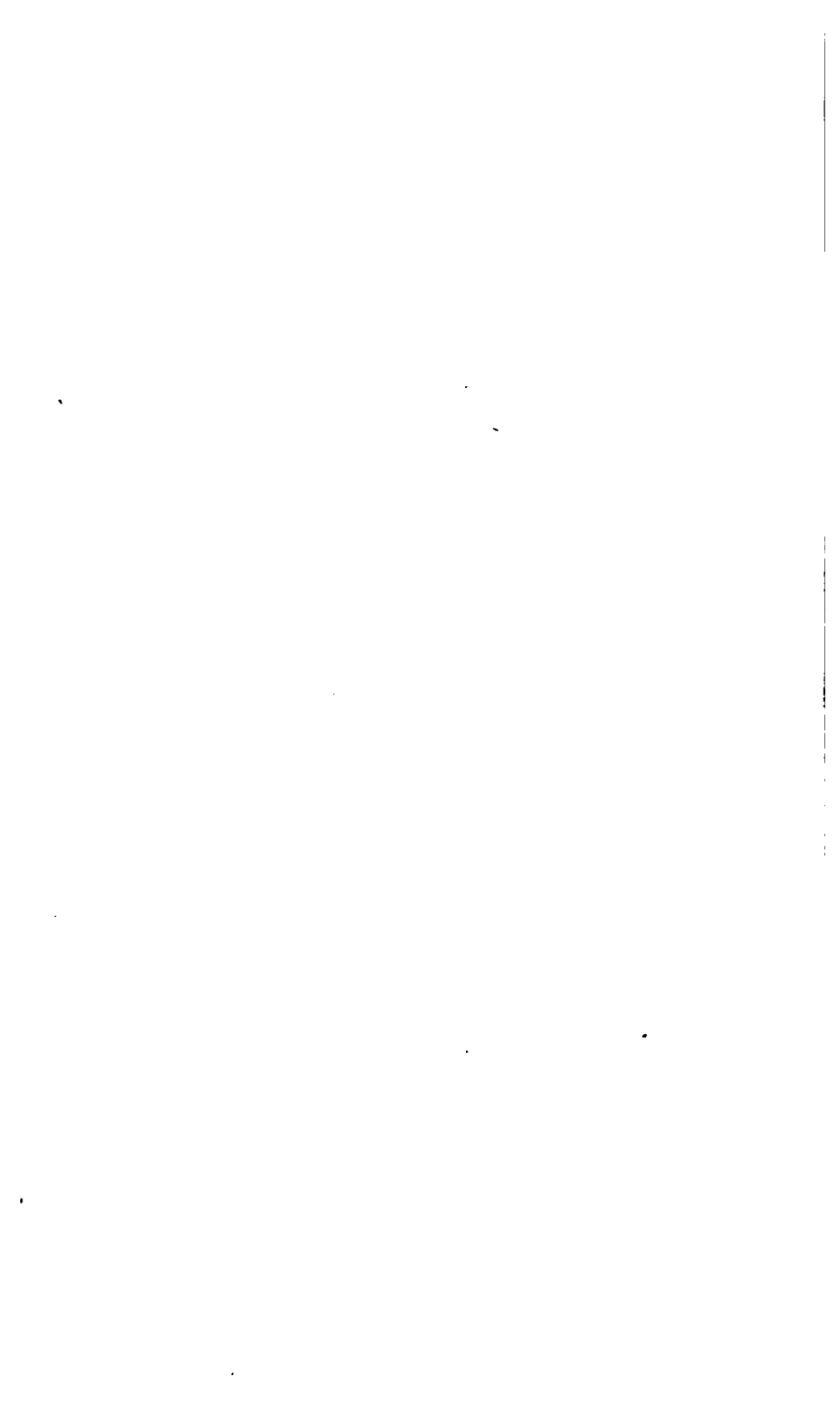
WITNESSES.

MILLWRIGHT AND CIVIL ENGINEER IS COMPETENT AS EXPERT to give an opinion as to the effect upon the water in the factory flume and upon the machinery in the factory by opening and shutting gates conducting water therefrom, where he has been employed for many years in the construction of mills and factories. *Hammond v. Woodman*, 219.









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